(9)

No. 04-5293 *** CAPITAL CASE ***
Title: Carman L. Deck, Petitioner
v.
Missouri
Docketed: July 20, 2004
Lower Ct: Supreme Court of Missouri
Case Nos.: (SC 85443)
Decision Date: May 25, 2004
Questions Presented

~~Date~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Jul 15 2004	Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due August 19, 2004)
Aug 6 2004	Order extending time to file response to petition to and including September 20, 2004.
Sep 20 2004	Brief of respondent Missouri in opposition filed.
Sep 30 2004	DISTRIBUTED for Conference of October 15, 2004.
Oct 18 2004	Motion to proceed in forma pauperis and petition for a writ of certiorari GRANTED.
Nov 26 2004	Extension of time within which to file the joint appendix and petitioner's brief on the merits to and including December 16, 2004.
Dec 7 2004	Letter of counsel for petitioner requesting permission to lodge documents from another appeal.
Dec 15 2004	SET FOR ARGUMENT ON Tuesday, March 1, 2005.
Dec 16 2004	Joint appendix filed.
Dec 16 2004	Brief of petitioner Carman L. Deck filed.
Dec 16 2004	Brief amici curiae of Bar Human Rights Committee of England, et al. filed.
Dec 30 2004	Extension of time within which to file respondent's brief on the merits to and including February 3, 2005.
Feb 2 2005	Brief amici curiae of California, et al. filed. (Distributed).
Feb 3 2005	Brief of respondent Missouri filed. (Distributed)
Feb 11 2005	Record received from the Supreme Court of Missouri. (1 box)
Feb 22 2005	Reply of petitioner Carman L. Deck filed. (Distributed)

(7)

IN THE
UNITED STATES SUPREME COURT

Supreme Court, U.S.
FILED
JUL 15 2004
OFFICE OF THE CLERK

CARMAN L. DECK,

Petitioner,

vs.

STATE OF MISSOURI,

Respondent.

No. 04-5293

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Comes now Rosemary E. Percival, attorney for Petitioner, Carman L. Deck, who is incarcerated in the Potosi Correctional Center, Missouri Department of Corrections, to ask leave to file the attached Petition for Writ of Certiorari in the Supreme Court of the United States without prepayment of costs and to proceed *in forma pauperis*. Leave was granted allowing Petitioner to proceed *in forma pauperis* in the Circuit Court of Jefferson County, Missouri, and the Supreme Court of the State of Missouri. The Petitioner's affidavit in support of this Petition is attached hereto.

Respectfully submitted,

Rosemary E. Percival
MOBar #45292
Attorney for Appellant
818 Grand Boulevard, Suite 200
Kansas City, Missouri 64106-1910
(816) 889-7699

Supreme Court, U.S.
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SUPREME COURT, U.S.

(10)

CERTIFICATE OF SERVICE

I, Rosemary E. Percival, hereby certify that on this 15th day of July, 2004, a true and correct copy of the foregoing was mailed postage prepaid to the Office of the Attorney General, 1530 Rax Court, Second Floor, Jefferson City, MO 65109.

Rosemary E. Percival

IN THE
UNITED STATES SUPREME COURT

Supreme Court, U.S.
FILED
JUL 15 2004
OFFICE OF THE CLERK

CARMAN DECK,

Petitioner,

vs.

STATE OF MISSOURI,

Respondent.

No. 04-5293

AFFIDAVIT IN SUPPORT OF PETITION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

I, Carman Deck, being first duly sworn according to law, depose and state that I am the Petitioner in this cause. Moreover, in support of my application for leave to proceed *in forma pauperis* pursuant to Rule 46 without being required to prepay costs or fees, I state:

1. I have been incarcerated in Missouri Correctional Facilities since April 27, 1998.

2. I am not employed and have not been employed since I was taken into custody on July 8, 1996.

3. I receive no income for any business, profession or other form of self-employment, or in the form of rent payment, interest, dividends or other sources.

4. I do not own any cash and I have no checking or savings accounts.

5. I do not own any real estate, stocks, bonds, notes, automobiles or other valuable property.

6. Because of my poverty, I am unable to pay the costs of this case.

7. I am unable to give security for this case.

8. I believe I am entitled to the redress I seek in this case.

9. The nature of the case is briefly stated as follows:

I was found guilty of two counts of first degree murder, §565.020, RSMo 2000; one count of first degree burglary, §569.160, RSMo 2000; one count of first degree robbery, §569.020, RSMo 2000; and two counts of armed criminal action, §571.015, RSMo 2000. I was sentenced to death in the Circuit Court of Jefferson County, Missouri. My petition that is filed concurrently with this Affidavit and Application seeks review of that judgment.

On May 25, 2004, the Missouri Supreme Court affirmed the sentence imposed by the trial court (the conviction itself had previously been affirmed). The Missouri Supreme Court subsequently denied my motion for rehearing on July 1, 2004. My attorney argued the constitutionality of the sentence imposed to the Missouri Supreme Court.

10. Unless I am permitted to proceed *in forma pauperis* with my Petition for Writ of Certiorari, I will be subject to execution under the mandate of the Missouri Supreme Court without having had the opportunity to present substantial constitutional questions to this Court. I understand that a false statement in this affidavit will subject me to penalties for perjury.

Carman L. Deck
Carman Deck

Subscribed and sworn to before me this 8th day of July, 2004.

Catherine L. Luebbering
Notary Public

" NOTARY SEAL "
Catherine L. Luebbering, Notary Public
St. Louis City, State of Missouri
My Commission Expires 6/18/2007

My Commission Expires: 6-18-07

Supreme Court, U.S.
FILED
JUL 15 2004
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES
NO. _____

CARMAN L. DECK,

Petitioner,

v. **CAPITAL CASE**

STATE OF MISSOURI,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI

ROSEMARY E. PERCIVAL
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818 Grand Boulevard, Suite 200
Kansas City, Missouri 64106-1910
(816) 889-7699

Counsel for Petitioner

CAPITAL CASE

QUESTION PRESENTED:

Are the Fifth, Sixth, Eighth, and Fourteenth Amendments violated by forcing a capital defendant to proceed through penalty phase while shackled and handcuffed to a belly chain in full view of the jury, and if so, doesn't the burden fall on the state to show that the error was harmless beyond a reasonable doubt, rather than on the defendant to show that he was prejudiced?

LIST OF PARTIES

The Petitioner, Carman L. Deck, appears through Rosemary E. Percival, Office of the State of Missouri Public Defender, 818 Grand Boulevard, Suite 200, Kansas City, Missouri 64106-1910.

The Respondent, State of Missouri, appears by Jeremiah (Jay) Nixon, Attorney General of Missouri, 1530 Rax Court, Second Floor, Jefferson City, MO 65109.

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The Court should grant the writ to determine whether the 5th, 6th, 8th, and 14th Amendments are violated by forcing a capital defendant to proceed through penalty phase while shackled and handcuffed. The Court has held that a defendant in guilt phase may not be visibly, physically restrained except as a last resort and only to further an essential state interest specific to each trial. Because the Court has not expressly applied this in penalty phase as well, some trial courts force defendants in capital penalty phase proceedings to be visibly restrained, without following the guidelines set forth by this Court. The State of Missouri, in particular, fails to require that visible physical restraints in penalty phase be used only as a last resort and only to further an essential state interest specific to the trial, and furthermore fails to treat the unwarranted shackling in penalty phase as a constitutional error subject to the harmless error rule of Chapman v. California.

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28 U.S.C. 1257(a) 1

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM _____

CARMAN L. DECK,

Petitioner,

v.

STATE OF MISSOURI,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI

Carman L. Deck, the Petitioner, respectfully petitions for a writ of certiorari to review the judgment of the Missouri Supreme Court. That Court affirmed Petitioner's convictions and sentence and denied relief.

OPINION BELOW

The Missouri Supreme Court's opinion, which is set forth in the Appendix at A1-10, is reported at State v. Deck, SC 85443, 2004 WL 1152872 (Mo. banc May 25, 2004).

JURISDICTION

The Missouri Supreme Court issued its opinion on May 25, 2004 (App. at A1-10). Petitioner's timely motion for rehearing (App. at A11-22) was denied on July 1, 2004 (App. at A23). This Court's jurisdiction is invoked under 28 U.S.C. 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

1. **Fifth Amendment**: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

2. **Sixth Amendment**: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

3. **Eighth Amendment**: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

4. **Fourteenth Amendment, Section 1**: "All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Carman Deck confessed to robbing and killing an elderly couple, James and Zelma Long, at their home on July 8, 1996 (Tr.436-37; Ex.69). He explained that he knew the Longs kept

large sums of money in a safe in their bedroom (Tr.439; Ex.69). He and his sister knocked on the Longs' door and asked for directions (Tr.440; Ex.69). The Longs invited them in and gave them the directions (Tr.440; Ex.69). As Deck headed to the door, he pulled a gun from where it had been hidden in his pants, pointed it at the Longs, and ordered them to lay on their bed (Tr.441; Ex.69). Deck took about $410 from the Longs (Tr.443; Ex.69).

For ten minutes, Deck stood at the foot of the Longs' bed wondering what to do (Tr.442; Ex.69). He "was nervous [and] didn't know what to do. I knew they'd already seen me and if I walked out of there and let them lay there I was in trouble anyway" (Ex.69). He simply did not know what to do (Ex.69). He was scared and nervous (Tr.450; Ex.69).

Deck's sister had been standing at the front door but ran back toward the bedroom and yelled that they needed to leave (Ex.69; Tr.442). Deck heard her run out to the car and the screen door slam shut (Ex.69). He was left "standing in there not knowing what to do, knowing that they already seen me. If I left I was going to go to jail. If I shot them I was going to jail. And just, uh, nervousness and sacredness. I just shot them" (Ex.69;Tr.442). Deck shot Mr. Long twice in the head, and then immediately shot Mrs. Long twice in the head (Tr.442;Ex.69).

Deck was charged with two counts of first-degree murder, two counts of armed criminal action, one count of first-degree robbery, and one count of first-degree burglary (L.F.54-56,61-63). In 1998, he was convicted of all counts and sentenced to death (Tr.406).

On appeal, the Missouri Supreme Court affirmed the convictions and death sentences. State v. Deck, 994 S.W.2d 527 (Mo.banc 1999). After Deck filed a motion for postconviction relief, however, the Missouri Supreme Court remanded for a new penalty phase. Deck v. State, 68 S.W.3d 418, 422 (Mo.banc. 2002).

Prior to the retrial, defense counsel filed a motion requesting that Deck be allowed to proceed through the penalty phase without restraints (L.F. 183-94). Defense counsel argued that forcing Deck to appear throughout penalty phase while restrained would violate his rights to due process, to equal protection, to remain silent, and to freedom from cruel and unusual punishment, as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments of the U.S. Constitution (L.F. 183). The court denied the motion (L.F. 49).

Shortly after voir dire started, defense counsel objected that Deck was in leg-irons and handchains, and that the restraints prejudiced him toward the jury and made him look dangerous (Tr.74). The court ruled, "[t]he objection that you're making will be overruled. He has been convicted and will remain in legirons and a belly chain" (Tr.74). Defense counsel then asked the jury panel whether anyone would be affected by Deck's shackles; no one responded that it would have any affect (Tr. 165). Before the jury was sworn, defense counsel requested that the entire jury panel be stricken for cause because they had seen the restraints (Tr.257). The court overruled the motion (Tr.257).

At the penalty phase retrial, evidence was presented as set forth above. After six hours of deliberations, the jury returned verdicts recommending death (Tr.563). The court overruled the motion for new trial and imposed death (Tr.565,570-71).

On appeal, Deck argued that the trial court abused its discretion in overruling his "Motion to Have Accused Appear at Trial Free of Restraints" and in forcing him to appear throughout the entire penalty phase in both leg irons and handcuffed with a belly chain. He argued that forcing Deck to appear before the jury in this manner deprived him of his rights to due process, equal protection, a fair and reliable sentencing, to confront the evidence against him, and freedom from

cruel and unusual punishment, as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

The Missouri Supreme Court stressed that the trial court has discretion to impose security measures necessary to maintain order and security in the courtroom, including the use of restraints. State v. Deck, 2004 WL 1152872 (Mo.banc, May 25, 2004), at*1. It held that sufficient evidence in the record supported the court's use of restraints, such as (1) the assumption that Deck was at risk to flee, since he was a repeat offender, who killed the victims to avoid being returned to custody; (2) defense counsel "made no record of the extent of the jury's awareness of the restraints throughout the penalty phase;" and (3) Deck did not claim that the restraints impeded him from participating in the proceedings. *Id.*, at *2. The Missouri Supreme Court further held that, "[e]ven assuming, arguendo, that the trial court did abuse its discretion in this instance, [Deck] has not demonstrated that the outcome of his trial was prejudiced. [Deck] offers nothing more than speculation in support of his argument. Neither being viewed in shackles by the venire panel prior to trial, nor being viewed while restrained throughout the entire trial, alone, is proof of prejudice." *Id.* The court stressed that the venire panel was questioned in voir dire, and all members responded that Deck's appearance in shackles would not affect their decision. *Id.*

REASON FOR GRANTING THE WRIT

The Court should grant the writ to determine whether the 5th, 6th, 8th, and 14th Amendments are violated by forcing a capital defendant to proceed through penalty phase while shackled and handcuffed. The Court has held that a defendant in guilt phase may not be visibly, physically restrained except as a last resort and only to further an essential

state interest specific to each trial. Because the Court has not expressly applied this in penalty phase as well, some trial courts force defendants in capital penalty phase proceedings to be visibly restrained, without following the guidelines set forth by this Court. The State of Missouri, in particular, fails to require that visible physical restraints in penalty phase be used only as a last resort and only to further an essential state interest specific to the trial, and furthermore fails to treat the unwarranted shackling in penalty phase as a constitutional error subject to the harmless error rule of Chapman v. California.

This Court has not yet addressed whether a defendant may be forcibly shackled and handcuffed during a capital penalty phase trial. But it has made crystal clear that "no person should be tried while shackled and gagged except as a last resort." Illinois v. Allen, 397 U.S. 337, 344 (1970). After all, several "inherent disadvantages and limitations" arise with the use of restraints. First, "the sight of shackles and gags might have a significant effect on the jury's feelings about the defendant." *Id.* Additionally, the use of restraints "is itself something of an affront to the very dignity and decorum of judicial proceedings that the judge is seeking to uphold." *Id.* Finally, one of the defendant's primary advantages of being present at trial – the ability to communicate with counsel – is greatly reduced when the defendant is totally restrained. *Id.* Notably, the Court did not ground its aversion to restraints on how they could affect the presumption of innocence, which is so crucial in guilt phase but obviously not at issue in penalty phase. In fact, the Court never mentioned the presumption of innocence.

Six years later, when considering whether a defendant could be forced to proceed to trial in prison clothing, the Court held that certain practices pose such a threat to the "fairness of the factfinding process" that they must be subjected to "close judicial scrutiny." Estelle v. Williams,

425 U.S. 501, 503-504 (1976). The Court held that forcing a defendant to appear in prison clothing does not further an essential state interest yet threatens the presumption of innocence and violates the defendant's right to equal protection. *Id.*, 505-506,512. "The constant reminder of the accused's condition implicit in such distinctive, identifiable attire may affect a juror's judgment." *Id.*, at 504-505.

In Holbrook v. Flynn, 475 U.S. 560, 568-69 (1986), the Court confirmed that practices such as shackling and other overt displays of security are inherently prejudicial and "should be permitted only where justified by an essential state interest specific to each trial." The Court noted that "shackling and prison clothes are unmistakable indications of the need to separate a defendant from the community at large." *Id.*

I. The Restrictions on Shackling Should Apply to Penalty Phase Just as in Guilt Phase:

A capital sentencing must proceed with the utmost reliability, since the stakes are so high and so irreversible. Woodson v. North Carolina, 428 U.S. 280, 305 (1976). An integral part of the jury's determination of whether a defendant should be sentenced to death is the threat of danger he poses to his community. *See, e.g.*, Simmons v. South Carolina, 512 U.S. 154, 162 (1994) ("defendant's future dangerousness bears on all sentencing determinations made in our criminal justice system"). Shackling a defendant during the penalty phase drastically tilts the scales in favor of the state by creating the ever-present risk that the jurors will presume that the defendant is dangerous and therefore worthy of a death sentence. Commonwealth v. Chester, 587 A.2d 1367, 1378-79 (Pa. 1991).

The prejudice from shackling may be even greater at penalty phase than at the guilt-innocence phase, since the jury is assessing the defendant's dangerousness and risk of future

violence and "might view the shackles as first hand evidence of future dangerousness and uncontrollable behavior which if unmanageable in the courtroom may also be unmanageable in prison, leaving death as a proper decision." Elledge v. Dugger, 823 F.2d 1439, 1450 (11th Cir. 1987). The issue to be decided at penalty phase – whether the defendant must be put to death – is as important as any issue determined at a regular criminal trial.

Shackles and other restraints tacitly communicate to the jury that the court believes the defendant is still so dangerous that he must be restrained even in the confines of the courtroom. Thus, the restraints present aggravating evidence that the defendant has no means to confront. Denying the defendant the chance to present evidence that he will behave well in prison if spared a death sentence warrants a new penalty phase. Skipper v. South Carolina, 476 U.S. 1, 5, 8-9 (1986). So too, denying the defendant the chance to confront evidence that he will behave badly must warrant a new trial. After all, future dangerousness should only be determined only "when the convicted felon has the opportunity to present his own side of the case." Barefoot v. Estelle, 463 U.S. 880, 901 (1983).

Federal courts have gone so far as to recognize the need to restrict the use of shackles and other restraints in civil cases. Civil commitment proceedings are analogous to penalty phase, since neither involves the question guilt or innocence, and both have a critical focus on whether the defendant is dangerous. In Tyars v. Finner, 709 F.2d 1274, 1285 (9th Cir. 1983), the Ninth Circuit reversed Tyars' involuntary commitment, because "[t]he likelihood of prejudice inherent in exhibiting the subject of a civil commitment hearing to the jury while bound in physical restraints, when the critical question the jury must decide is whether the individual is dangerous to himself or others, is simply too great to be countenanced without at least some prior showing of necessity." The federal court held that, without a showing that the restraints were necessary or

that less restrictive means could not have achieved the same purpose, the circumstances "deprive[d] the ... proceeding of the appearance of evenhanded justice which is at the core of due process." *Id.*, *quoting* Mayberry v. Pennsylvania, 400 U.S. 455, 469 (1971) (Harlan, J., concurring).

So, too, in a civil rights action brought by a prison inmate, the inmate may not be forced to wear shackles unless there is extreme need. Lemons v. Skidmore, 985 F.2d 354, 357-58 (7th Cir. 1993). The Seventh Circuit held:

> In a civil case, the plaintiff is still entitled to a fair trial in which the jury decides the case based on admissible evidence. The shackles suggest to the jury in a civil case that the plaintiff is a violent person. Since plaintiff's tendency towards violence was at issue in this case, shackles inevitably prejudiced the jury.

Id., at 357.

A. Jurisdictions Applying Restrictions to Penalty Phase:

Most jurisdictions have applied these principles as stringently – or more stringently – in penalty phase as in guilt phase. For example, in Roche v. Davis, 291 F.3d 473, 484 (7th Cir. 2002), the United States Court of Appeals for the Seventh Circuit held that the defendant was not denied his right to the effective assistance of counsel by his attorney's failure to object to his appearance in shackles in guilt phase. But the Seventh Circuit held that the defendant's right to the effective assistance was violated by the attorney's failure to object to the shackles in penalty phase. *Id.* Because the mitigating evidence was strong, and the jury deliberated in penalty phase eight hours without being able to recommend a death sentence, a reasonable probability existed that the shackling made a difference in the outcome of the trial. *Id.*

In Laird v. Horn, 159 F.Supp.2d 58, 99-102 (E.D.Pa. 2001), the federal district court granted habeas relief when the defendant was forced to wear handcuffs and shackles in penalty phase even though defense counsel did not object. The court recognized that "shackling

petitioner during the penalty phase could have created the presumption in the minds of the jurors that petitioner was dangerous and worthy of the death sentence.... This risk is ever-present in a death penalty case." *Id.*, at 101, *citing* Commonwealth v. Chester, 587 A.2d 1367, 1378-79 (Pa. 1991).

In Duckett v. Godinez, 67 F.3d 734, 748 (9th Cir. 1995), the Ninth Circuit concluded that "the constitutional rules regarding shackling at trial apply equally in the sentencing context."

> In the penalty phase of a capital trial, the jury knows the defendant is a convicted felon. But the extent to which he continues to be dangerous is a central issue the jury must decide in determining his sentence. "[N]ot all convicted felons are so dangerous and violent that they must be brought to court and kept in handcuffs and leg irons." Unlike prison clothes, physical restraints may create the impression in the minds of the jury that the court believes the defendant is a particularly dangerous and violent person. Therefore, in the absence of a compelling need to shackle the defendant during his sentencing hearing, such a practice is inherently prejudicial.

Id. (internal citations omitted).

In Elledge v. Dugger, 823 F.2d 1439, 1450-52 (11th Cir. 1987), the Eleventh Circuit granted the defendant a new penalty phase due to shackling, because there was no showing that shackling was necessary, or that the court considered alternatives to shackling. The Eleventh Circuit stressed that "there seems to be no reason to restrict the principles [of the Supreme Court decisions] to the guilt-innocence phase of the trial. *Id.*, at 1451. It went as far as to say:

> Nothing in Holbrook indicates that the Supreme Court did not intend its ruling to apply to the penalty phase of a capital case; furthermore, it is unreasonable to believe that the court made its rule in Holbrook unaware that capital case trials are bifurcated. We think Holbrook means what it says.

Id., at 1451, fn22; *see also* Bello v. Florida, 547 So.2d 914 (Fla.1989) (shackling of defendant during penalty phase was prejudicial error where trial court overruled objection without making any inquiry into necessity for shackling).

B. Jurisdictions Not Applying Restrictions:

In contrast, some jurisdictions do not hold trial courts to the demands of the Supreme Court trilogy of Illinois v. Allen, Estelle v. Williams, and Holbrook v. Flynn. They instead reason that since the defendant has been convicted, there is no longer a presumption of innocence. These courts tend to hold that the fact of a murder conviction in itself warrants shackling, regardless of the individual facts of the case. They do not require the courts to use shackling as a last resort, or to ensure that the shackling furthers an essential state interest specific to the trial.

In Canape v. State, 859 P.2d 1023, 1028 (Nev. 1993), the defendant was shackled during penalty phase on the justification that he had just been convicted of first degree murder and therefore represented a safety and flight risk. Nothing but the fact of the conviction supported the fear that the defendant would be a safety risk or would attempt to flee. *Id.* The Nevada Supreme Court upheld the judge's decision to shackle, because "a defendant's constitutional right to appear before a jury free of prison clothing and restraints no longer exists at a penalty hearing because public safety concerns are accorded greater significance once a jury returns a finding of guilt." *Id.*

So, too, the Missouri Supreme Court appears to believe that shackling is warranted in penalty phase merely upon the fact of a conviction. In the instant case, Deck had given absolutely no indication of a wish to escape and had not been violent or aggressive. State v. Deck, SC 85443, 2004 WL 1152872 (Mo. banc May 25, 2004). This was a penalty phase retrial, and Deck had not been shackled at the first trial. Nor had Deck caused any problems at the first trial. The only basis given by the trial court was the fact that Deck had been convicted of murder (Tr.74).

The Missouri Supreme Court upheld the trial court's rationale. Deck, 2004 WL 1152872, at *1-2. It held that the shackling was warranted given the fact that Deck was a repeat offender (his priors were all for non-violent crimes) and he had killed his two victims to avoid being prosecuted for robbing them. *Id.*, at *2. The Missouri Supreme Court did not follow this Court's instruction that shackling be employed only as a last resort, and only to further an essential state interest specific to Deck's trial.

II. Because Unwarranted Shackling is Constitutional Error, the Burden Falls on the State to Show that the Error was Harmless

As well as flouting this Court's holdings in the trilogy of Illinois v. Allen, Estelle v. Williams, and Holbrook v. Flynn, Missouri flouts this Court's holding in Chapman v. California, 386 U.S. 18, 24 (1967). Chapman holds that once an error of constitutional dimension has been found, the burden falls on the state to show that the error was harmless beyond a reasonable doubt, in order to avoid retrial. *Id.*

Instead, Missouri places the burden on the defendant to show that he was prejudiced by the constitutional error. The Missouri Supreme Court held that:

> Even assuming, arguendo, that the trial court did abuse its discretion in this instance, [Deck] has not demonstrated that the outcome of his trial was prejudiced. [Deck] offers nothing more than speculation in support of his argument. Neither being viewed in shackles by the venire panel prior to trial, nor being viewed while restrained throughout the entire trial, alone, is proof of prejudice.

Deck, 2004 WL 1152872, at *2. The court stressed that the venire panel was questioned in voir dire, and all members responded that Deck's appearance in shackles would not affect their decision. *Id.*

The Missouri Supreme Court refused to consider this Court's instruction that practices such as shackling are "inherently prejudicial." Holbrook, 475 U.S., at 568.

Furthermore, this Court has specifically recognized that jurors' responses in voir dire may not necessarily be dispositive of the prejudice engendered by inherently prejudicial practices like shackling. *Id.*, at 570. "If 'a procedure employed by the State involves such a probability that prejudice will result that it is deemed inherently lacking in due process,' little stock need be placed in jurors' claims to the contrary." *Id.*, *quoting* Estes v. Texas, 381 U.S. 532, 542-43 (1965). The Court reasoned that:

> Even though a practice may be inherently prejudicial, jurors will not necessarily be fully conscious of the effect it will have on their attitude toward the accused. This will be especially true when jurors are questioned at the very beginning of proceedings; at that point, they can only speculate on how they will feel after being exposed to a practice daily over the course of a long trial.

Holbrook, 475 U.S., at 570. The proper inquiry is "not whether jurors actually articulated a consciousness of some prejudicial effect, but rather whether "an unacceptable risk is presented of impermissible factors coming into play." *Id.*, *quoting* Estelle, 425 U.S. at 505; *see also* Lovell v. State, 702 A.2d 261, 273-74 (Md. 1997) (restraining a defendant is so inherently prejudicial that a new penalty phase was warranted even though the court actually instructed the jurors to disregard the shackling and handcuffs).

The court's order requiring the full restraints – made without good cause, without consideration of less prejudicial measures, and over timely objection – deprived Deck of his rights to due process, equal protection, a fair and reliable sentencing, to confront the evidence against him, and freedom from cruel and unusual punishment, as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. In this close penalty phase, where the jury deliberated six hours, too great a danger exists that the jury's deliberations were affected by its viewing Deck in shackles and handcuffed to a belly chain throughout the entire proceedings. This Court must grant certiorari.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Rosemary E. Percival, hereby certify that on this 15th day of July, 2004, a true and correct copy of the foregoing was mailed postage prepaid to the Office of the Attorney General, 1530 Rax Court, Second Floor, Jefferson City, MO 65109.

Rosemary E. Percival

IN THE SUPREME COURT OF THE UNITED STATES
NO. _____

CARMAN L. DECK,

Petitioner,

v. CAPITAL CASE

STATE OF MISSOURI,

Respondent.

APPENDIX
TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI

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Westlaw.

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--- S.W.3d ---
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Supreme Court of Missouri,
En Banc.

STATE of Missouri, Respondent,
v.
Carman DECK, Appellant.

No. SC 85443.

May 25, 2004.

Background: Defendant filed motion for postconviction relief from murder conviction and death sentence, alleging ineffective assistance of counsel. The Circuit Court, Jefferson County, Gary P. Kramer, J., denied motion. The Supreme Court reversed, holding that failure to offer proper mitigation instructions during penalty phase was ineffective assistance of counsel, 68 S.W.3d 418. After new sentencing hearing, the jury again recommended two death sentences, and judgment was entered consistent with that recommendation. Defendant appealed.

Holdings: The Court of Appeals, Ronnie L. White, C.J., held that:
(1) officer's double-hearsay testimony concerning citizen's report relaying another out-of-court declarant's statement warning of robbery and possible murder was admissible to supply relevant background information;
(2) trial court was justified in requiring defendant to be restrained in courtroom throughout trial;
(3) any error in trial court's decision to restrain defendant was harmless;
(4) trial court's unobjected-to pattern penalty-phase jury instructions did not suggest to jury that State's burden of proving aggravating circumstances was lower than beyond reasonable doubt;
(5) trial court's unobjected-to failure to administer short-form jury recess instruction did not amount to plain error;
(6) victim-impact evidence of chart depicting murder victim's family tree was admissible;
(7) victim-impact evidence of narrative statement of murder victim's son was admissible;
(8) victim-impact testimony of murder victim's daughter referencing victim's 11-year-old granddaughter's fear of coming to court was admissible;
(9) portion of State's closing jury argument in which it asked jurors to think about murder victims prior to their death was appropriate reference to record and response to defense argument;
(10) venire members were subject to exclusion from jury for cause based on their equivocation about their ability to recommend death sentence;
(11) jury's recommendation that defendant be sentenced to death was supported upon unanimous finding of six aggravating factors; and
(12) omission of statutory aggravating factors from indictment did not deprive trial court of jurisdiction to impose death penalty.

Affirmed.

[1] Criminal Law ⇐419(3)

110k419(3) Most Cited Cases

[1] Criminal Law ⇐419(13)
110k419(13) Most Cited Cases

Police officer's double-hearsay testimony concerning citizen's report relaying another out-of-court declarant's statement warning of robbery and possible murder was admissible to supply relevant background information, to explain

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why police began search for defendant and a house-to-house search that ultimately led to discovery of murder scene.

[2] Criminal Law ⇐419(1)
110k419(1) Most Cited Cases

A hearsay statement is any out-of-court statement that is used to prove the truth of the matter asserted and that depends on the veracity of the statement for its value.

[3] Criminal Law ⇐419(3)
110k419(3) Most Cited Cases

Statements made by out-of-court declarants that explain subsequent police conduct are admissible to supply relevant background information and continuity.

[4] Criminal Law ⇐637
110k637 Most Cited Cases

Trial court was justified in requiring defendant, accused of murder, to be restrained in courtroom throughout trial, with leg irons, handcuffs, and belly chain, where defendant's trial counsel made no record of jury's awareness of restraints, and evidence demonstrated a flight risk, defendant, a repeat offender, having allegedly killed his two victims to avoid apprehension.

[5] Criminal Law ⇐637
110k637 Most Cited Cases

Challenging the trial court's discretion to impose security by restraining a defendant during jury trial is an individual and fact-specific inquiry.

[6] Criminal Law ⇐1166.8
110k1166.8 Most Cited Cases

Any error in trial court's decision to restrain defendant in courtroom throughout murder trial, with leg irons, handcuffs, and belly chain, was harmless, since showing of restraints, by itself, did not demonstrate prejudice, and when questioned during voir dire, jurors stated that defendant's appearance in shackles would not affect their decision.

[7] Sentencing and Punishment ⇐1780(3)
350Hk1780(3) Most Cited Cases

[7] Sentencing and Punishment ⇐1789(3)
350Hk1789(3) Most Cited Cases

Trial court's unobjected-to pattern penalty-phase jury instructions following defendant's conviction for murder, in which State sought death penalty, did not suggest to jury that State's burden of proving aggravating circumstances was lower than beyond reasonable doubt, nor amount to plain error. MAI Criminal 3d Nos. 313.41A et seq., 313.44A et seq.

[8] Sentencing and Punishment ⇐1789(3)
350Hk1789(3) Most Cited Cases
Grounds

Trial court's unobjected-to failure to administer short-form jury recess instruction during penalty phase of murder trial, requiring jurors to abstain from discussing case with anyone until case was submitted for deliberations, did not amount to plain error, where jury had heard instruction multiple times throughout course of trial, and there was no evidence indicating violation of instruction by any juror by discussing the case or by forming an opinion prior to completion of case. MAI Criminal 3d No. 300.04, subd. 2.

[9] Criminal Law ⇐1038.1(2)
110k1038.1(2) Most Cited Cases

To establish that an unobjected-to instructional error rose to the level of plain error, the appellant must demonstrate that the trial court so misdirected or failed to instruct the jury that it is evident the instructional error affected the jury's verdict.

[10] Sentencing and Punishment ⇐1763
350Hk1763 Most Cited Cases

Victim-impact evidence of chart depicting murder victim's family tree, with 46 named family members, was admissible during penalty phase of trial, even though chart contained names of several family members who had not yet been born at time of murder, and spouses who were no longer part of victim's family, where such information was provided to jury, which was free to decide what impact, if any, victim's death had on those absent

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family members.

[11] Sentencing and Punishment ⇐1752
350Hk1752 Most Cited Cases

The trial court is vested with broad discretion in determining the admissibility of evidence offered at the penalty stage of a capital murder case.

[12] Sentencing and Punishment ⇐1763
350Hk1763 Most Cited Cases

Victim impact evidence is admissible during the penalty phase of a capital murder case under the federal and state Constitutions, and the state is permitted to show that a victim is not a faceless stranger and that his or her death represents a unique loss to society and to the family.

[13] Sentencing and Punishment ⇐310
350Hk310 Most Cited Cases

Victim impact evidence violates the constitution only if it is so unduly prejudicial that it renders the trial fundamentally unfair. U.S.C.A. Const.Amend. 6

[14] Sentencing and Punishment ⇐1763
350Hk1763 Most Cited Cases

Victim-impact evidence of narrative statement of murder victim's son during punishment phase of trial was admissible to help prevent him from breaking down emotionally or from making impermissible statements.

[15] Witnesses ⇐235
410k235 Most Cited Cases

The form of witness examination in a criminal trial, whether in a narrative or interrogatory manner, is a matter committed to discretion of the trial court.

[16] Sentencing and Punishment ⇐1763
350Hk1763 Most Cited Cases

Victim-impact testimony of murder victim's daughter during penalty phase of trial, referencing her daughter's fear of coming to court, was admissible absent showing that statement would somehow allow jurors to speculate that her fear was related to defendant's presence in courtroom.

[17] Criminal Law ⇐723(1)
110k723(1) Most Cited Cases

[17] Criminal Law ⇐726
110k726 Most Cited Cases

Portion of State's closing jury argument in which it asked jurors to think about murder victims during the moments prior to their deaths, "on their stomachs begging for their lives for ten minutes," was appropriate reference to record and response to defense argument, and thus, trial court was under no obligation to sustain defendant's objection to argument.

[18] Criminal Law ⇐708.1
110k708.1 Most Cited Cases

[18] Criminal Law ⇐1154
110k1154 Most Cited Cases

The trial court has broad discretion in controlling the scope of closing argument and the trial court's rulings will be cause for reversal only upon a showing of abuse of discretion resulting in prejudice to the defendant.

[19] Criminal Law ⇐723(4)
110k723(4) Most Cited Cases

"Improper personalization" in closing argument occurs when the argument suggests a personal danger to the jurors or their families.

[20] Criminal Law ⇐723(4)
110k723(4) Most Cited Cases

Arguing for jurors to supplant themselves in the position of a party or a victim is improper personalization that can only arouse fear in the jury.

[21] Jury ⇐108
230k108 Most Cited Cases

Venire members were subject to exclusion from jury for cause based on their equivocation about their ability to recommend death sentence during voir dire in capital murder case; two prospective jurors indicated that they had a problem with

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considering the death penalty and that they believed punishment should be limited to life imprisonment without parole.

[22] Jury ⇦104.1
230k104.1 Most Cited Cases

Venirepersons may be excluded from the jury when their views would prevent or substantially impair the performance of their duties as jurors in accordance with the trial court's instructions and their oaths.

[23] Jury ⇦126
230k126 Most Cited Cases

A challenge for cause will be sustained if it appears that the venireperson cannot consider the entire range of punishment, apply the proper burden of proof, or otherwise follow the trial court's instructions in a first degree murder case.

[24] Jury ⇦108
230k108 Most Cited Cases

A juror's equivocation about his ability to follow the law in a capital case together with an equivocal statement that he could not sign a verdict of death can provide a basis for the trial court to exclude the venireperson from the jury.

[25] Sentencing and Punishment ⇦1661
350Hk1661 Most Cited Cases

[25] Sentencing and Punishment ⇦1788(6)
350Hk1788(6) Most Cited Cases

Jury's recommendation that defendant be sentenced to death for double homicide, rather than a product of passion, prejudice, or any other arbitrary factor, was supported upon unanimous finding of six aggravating factors, and sentence was neither excessive nor disproportionate to penalties imposed in similar cases, considering the crime, strength of evidence, and the defendant. V.A.M.S. §§ 565.032, subd. 2(2, 4, 7, 10, 11), 565.035, subd. 3.

[26] Indictment and Information ⇦113
210k113 Most Cited Cases

Omission of statutory aggravating factors from indictment charging defendant with first-degree murder did not deprive trial court of jurisdiction to impose death penalty; single offense of murder was recognized by sentencing statute as qualifying offense for death sentence.

Rosemary E. Percival, Office of the Public Defender, Kansas City, MO, for appellant.

Jeremiah W. (Jay) Nixon, Atty. Gen., Evan J. Buchheim, Asst. Atty. Gen., Jefferson City, MO, for Respondent.

RONNIE L. WHITE, Chief Justice.

I.

*1 A jury convicted Appellant, Carman Deck, of two counts of first-degree murder and recommended a sentence of death for each count. [FN1] Judgment was entered consistent with the recommendation. Appellant moved for postconviction relief after his convictions and sentences were affirmed on direct appeal. [FN2] This Court remanded for a new penalty phase, finding that trial counsel's failure to offer proper mitigation instructions during that phase of the trial constituted ineffective assistance of counsel. [FN3] On retrial, the jury recommended two death sentences, and judgment was entered consistent with that recommendation. Appellant now asserts nine points of error with his resentencing. This Court has jurisdiction pursuant to Mo. Const. art. V, sec. 3. Affirmed.

II.

In his first point, Appellant contends that the trial court abused its discretion by allowing the admission of a double hearsay statement made to Deputy Sheriff Donna Thomas. Charles Hill made the original statement to Tonia Cummings, who in turn relayed it to Deputy Thomas. The statement was a warning that a robbery and possible murder were going to occur in rural DeSoto, Missouri, involving an elderly gentleman.

[1][2][3] "A hearsay statement is any out-of-court statement that is used to prove the truth of the matter asserted and that depends on the veracity of

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the statement for its value." [FN4] Charles Hill's statement was offered to explain why the police began a search for the Appellant and a house-to-house search that ultimately led to discovery of the crime scene. Statements made by out-of-court declarants that explain subsequent police conduct are admissible to supply relevant background information and continuity. [FN5] The trial court did not abuse its discretion when allowing the admission of this out-of-court statement.

III.

[4] Next Appellant asserts that the trial court abused its discretion by overruling his motion to appear at trial free of restraints. Appellant believes having to appear before the jury wearing leg irons and handcuffed to a belly chain violated his rights to due process, equal protection, confrontation of the evidence, a fair and reliable sentencing and freedom from cruel and unusual punishment.

[5] The trial court has discretion to impose security measures necessary to maintain order and security in the courtroom, including the use of restraints. [FN6] "A trial court abuses its discretion when its ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration." [FN7] "If reasonable persons can differ as to the propriety of the trial court's action, then it cannot be said that the trial court abused its discretion." [FN8] Recognizing this discretion, however, this Court does not minimize in any way its concern for maintaining a jury that is not prejudiced by extra-judicial influences and passions. Challenging the trial court's discretion to impose security by use of restraints is an individual and fact-specific inquiry.

*2 Trial counsel made no record of the extent of the jury's awareness of the restraints throughout the penalty phase, and Appellant does not claim that the restraints impeded him from participating in the proceedings. There is also evidence that there was a risk that Appellant might flee in that he was a repeat offender and evidence from the guilt phase of his trial indicated that he killed his two victims to avoid being returned to custody. While this does not represent a comprehensive list of factors this Court would analyze in making determinations on this issue, there is sufficient evidence in the record to support the trial court's exercise of its discretion to deny Appellant's motion.

[6] Even assuming, arguendo, that the trial court did abuse its discretion in this instance, Appellant has not demonstrated that the outcome of his trial was prejudiced. Appellant offers nothing more than speculation in support of his argument. Neither being viewed in shackles by the venire panel prior to trial, nor being viewed while restrained throughout the entire trial, alone, is proof of prejudice. [FN9] Moreover, the venire panel was questioned in voir dire, and all members responded that Appellant's appearance in shackles would not affect their decision.

IV.

[7] In Appellant's third point, he argues that the trial court plainly erred when submitting penalty phase instructions numbers 7, 8, 12, and 13. He contends that these instructions did not inform the jury that the State bore the burden of proving aggravating circumstances beyond a reasonable doubt and that mitigating circumstances were insufficient to outweigh the evidence of aggravating circumstances. Appellant believes the wording of the instructions could have allowed the jury to infer that the burden of proof was lower than beyond a reasonable doubt. Having not raised this issue at trial, review is under the plain error standard. [FN10]

These instructions are derived from section 565.030.4 and were appropriately patterned after MAI-CR 3d 313.41, and 313.44. [FN11] This Court recently addressed this claim and found no error with these patterned instructions. [FN12] The MAI instructions are constitutional, and there was no plain error in law with their delivery to the jury. [FN13] Having examined this claim thoroughly and finding no error of law, an extended opinion on these issues would have no precedential value. [FN14]

V.

[8] Appellant's fourth point raises the issue of whether the trial court erred by failing to read to the

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jury MAI-CR 3d 300.04.2--the short version of the jury recess instruction. [FN15] Appellant claims that the jury's verdict was affected because the court failed to provide the short version of the instruction when: (1) the court divided the jury panel into small groups for death qualification, (2) the small groups returned to the larger group, (3) the proceedings ended on the first and second days of trial, and (4) the parties rested their cases. Defense counsel failed to timely object to this alleged error, so this Court reviews for plain error. [FN16]

*3 [9] To establish that the instructional error rose to the level of plain error, appellant must demonstrate that the trial court so misdirected or failed to instruct the jury that it is evident the instructional error affected the jury's verdict. [FN17] The jury recess instruction directs the jury not to discuss the case with anyone, including the other jury members, or express or form an opinion of the case until it is submitted for the jury's decision. [FN18]

The Notes on Use for MAI-CR 3d 300.04 state that the long version, 300.04.1, entitled, "At the First Recess and Adjournment," shall be read at the conclusion of voir dire and if recess occurs during voir dire than it shall also be read at that time. The short version of this MAI, 300.04.2, is entitled, "At Subsequent Recesses or Adjournments," and the Notes of Use state that it may be given in any other form so long as it complies with section 546.230.

The record reveals that, while Appellant's claimed omissions did occur, the panel was given the full instruction prior to the noon recess during voir dire, again prior to individual voir dire in the afternoon and again when voir dire was completed. During the death qualification phase, the jurors were not in recess while the smaller groups were interviewed to trigger the need to read the instruction. The instruction was again delivered prior to a recess for dinner, and after dinner the jury was assembled and instructed to return home and pack to prepare for hotel sequestration. On the second day of trial, the instruction was given at every recess, but not at the day's adjournment. On the third day of trial, the instruction was given at every recess except for the one occurring after both parties had rested and before the instruction conference began. The jury heard the instruction multiple times throughout the course of Appellant's trial, and Appellant offers no evidence that any juror violated the instruction by engaging in discussion about the case or by forming an opinion prior to the completion of the case. The trial court did not so misdirect or fail to instruct the jury that it is evident the instructional error affected the jury's verdict. Appellant's claim fails to establish plain error for the limited omissions in repeating the recess instruction.

VI.

[10] Appellant next argues the trial court abused its discretion with the admission of victim-impact evidence. Specifically, he asserts that an extensive family tree from the victim's family, a narrative statement by the victim's son, and an alleged hearsay statement that the victim's granddaughter was worried and afraid to come to court were excessive and prejudicial.

[11][12][13] "[T]he trial court is vested with broad discretion in determining the admissibility of evidence offered at the penalty stage of a capital case." [FN19] Victim impact evidence is admissible under the United States and Missouri Constitutions, and the State is permitted to show that a victim is not a faceless stranger and that his or her death represents a unique loss to society and to the family. [FN20] "[V]ictim impact evidence violates the constitution only if it is so unduly prejudicial that it renders the trial fundamentally unfair." [FN21]

*4 The chart depicting the victim's family tree, with 46 named family members, was found by the trial court to be less prejudicial than having each of these individuals testify. The chart did contain the names of several family members who had not yet been born at the time of the murders and spouses that were no longer part of the family. This information was provided to the jury; however, the jury was free to decide what impact, if any, the victims' deaths had on those absent family members.

[14][15] The narrative statement, read by the victims' son, was intended to help prevent him from breaking down emotionally or from making impermissible statements. It was the same statement

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that was read at Appellant's first trial, and being narrative as opposed to interrogative does not constitute a per se abuse of discretion. [FN22] As Appellant points out, this statement did include the remark, "How senseless this was to take the nucleus of our family away." However, this remark is not inconsistent with other remarks contained within the narrative, and Appellant provides nothing more than speculation in his attempt to claim that this narrative, or the individual statement, was in any way prejudicial.

[16] Finally, with regard to the victims' daughter's testimony referencing the eleven-year-old granddaughter's fear of coming to court, this would only be a natural response for any child having to attend a courtroom proceeding. Appellant again fails to substantiate his clam that this statement would somehow allow jurors to speculate that her fear was related solely to Appellant's presence in the courtroom.

In short, all of Appellant's assertions regarding the victim impact evidence are unsubstantiated and based totally in speculation. Defendant's bare assertions of prejudice are not sufficient to establish fundamental unfairness nor do they demonstrate how the outcome of the case was substantively altered.

VII.

[17] In his sixth point, Appellant argues that the trial court abused its discretion by allowing the State, over objection, to personalize its closing argument. Appellant claims that the prosecutor urged the jurors to "relive" the final ten minutes of the victims' lives when they begged for mercy while the Appellant contemplated if he would murder them. Appellant believes that allowing this alleged improper argument deprived him of rights to due process, a fair trial and impartial jury, and freedom from cruel and unusual punishment.

[18][19][20] "The trial court has broad discretion in controlling the scope of closing argument and the court's rulings will be cause for reversal only upon a showing of abuse of discretion resulting in prejudice to the defendant." [FN23] "Improper personalization in closing argument occurs when the argument suggests a personal danger to the jurors or their families." [FN24] Arguing for jurors to supplant themselves in the position of a party or a victim is also improper personalization that can only arouse fear in the jury. [FN25]

*5 In Appellant's closing argument, defense counsel stated that this was not a planned murder and that Appellant was scared and nervous. Counsel also states, "... and he made a lousy, lousy decision. He never should've shot. He never should be beea [sic] in there in the first place. He never should've, but it's a split second and on the tape it says he went there to rob."

In response to this argument that the murder was not planned, the prosecutor in his closing argument states, "Think about the evidence. Think about [Appellant] with the gun in his hand, James and Zelma Long lying on the bed. Ten minutes doesn't seem that long. See how long that is just when you're sitting in the jury room. Think about them on their stomachs begging for their lives for ten minutes."

The evidence of the ten minutes elapsing between the time the victims were ordered to lay on the bed in the positions described and the time of their being shot was properly in the record, and it was not improper to reference these facts in closing argument. The specific reference to these facts in the prosecutor's statements above addressed the credibility of Appellant's claim that the murders were committed without more than a split second's worth of thought. The trial court did not abuse its discretion when overruling Appellant's objection, and there is no evidence, beyond speculation, that the decision to allow the prosecutor's argument to proceed resulted in prejudice to the defendant.

VIII.

[21][22][23] Appellant next asserts that the trial court abused its discretion when overruling his objection to striking venirepersons Richard Overmann and Michael Schaeffer for cause. However, "[v]enirepersons may be excluded from the jury when their views would prevent or substantially impair the performance of their duties as jurors in accordance with the court's instructions and their oaths". [FN26] "A challenge for cause will be sustained if it appears that the venireperson

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cannot consider the entire range of punishment, apply the proper burden of proof, or otherwise follow the court's instructions in a first degree murder case." [FN27]

[24] The transcripts show that both prospective jurors indicated that they had a problem with considering the death penalty and that they believed punishment should be limited to life imprisonment without parole. There was serious equivocation expressed by Mr. Overmann and Mr. Schaeffer about their ability to follow the instructions of the court and their ability to consider and recommend the full range of punishment for Appellant. "A juror's equivocation about his ability to follow the law in a capital case together with an equivocal statement that he could not sign a verdict of death can provide a basis for the trial court to exclude the venireperson from the jury." [FN28] The trial court did not abuse its discretion when sustaining the prosecutor's motion to strike.

IX.

[25] Appellant raises, as his eighth point, this Court's independent proportionality review and advocates for reducing his sentence to life imprisonment without parole. Under section 565.035.3, this Court is required to determine whether:

*6 (1) The sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor;

(2) The evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in subsection 2 of section 565.032 and any other circumstance found;

(3) The sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime, the strength of the evidence, and the defendant.

Having thoroughly reviewed the record, this Court concludes that there is no evidence to suggest that the punishment imposed was a product of passion, prejudice, or any other arbitrary factor.

The trial court's findings are next reviewed to determine if the evidence supports, beyond a reasonable doubt, the existence of an aggravating circumstance and any other circumstance found. In Appellant's first trial, the jury unanimously found six statutory aggravating circumstances as a basis for considering the two death sentences. [FN29] The same evidence was heard in Appellant's retrial of the penalty phase, and it amply supports the statutory aggravators found by the jury when delivering its recommendation for the death sentence.

Finally, this Court has upheld sentences of death in similar cases where the defendant murdered multiple victims, acted for pecuniary gain, or where the defendant sought to eliminate possible witnesses to avoid a lawful arrest. [FN30] The death sentences in this case are neither excessive nor disproportionate to the penalty imposed in similar cases, considering the crime, the strength of the evidence, and the defendant.

X.

[26] Appellant finally argues that the trial court lacked jurisdiction and authority to sentence Appellant because the state failed to charge him with "aggravated first-degree murder." Appellant contends that failure to plead facts, as listed in section 565.030.4, creates a charge of murder whereby the maximum penalty was life in prison.

This Court has addressed this claim numerous times before. The omission of statutory aggravators from an indictment charging the defendant with first-degree murder does not deprive the sentencing court of jurisdiction to impose the death penalty. [FN31] Missouri's statutory scheme recognizes a single offense of murder with maximum sentence of death, and the requirement that aggravating facts or circumstances be present to warrant imposition of death penalty does not have the effect of increasing the maximum penalty for the offense. [FN32] Having examined this claim thoroughly and finding no error of law, an extended opinion on these issues would have no precedential value. [FN33]

XI.

The judgment is affirmed.

All concur.

FN1. Appellant was also convicted of two counts of armed criminal action, one count of first-degree robbery, and one count of first-degree burglary for which he received, respectively, concurrent life sentences, consecutive thirty-year sentences, and a fifteen-year sentence.

FN2. *State v. Deck*, 994 S.W.2d 527 (Mo. banc 1999).

FN3. *Deck v. State*, 68 S.W.3d 418 (Mo. banc 2002).

FN4. *Smulls v. State*, 71 S.W.3d 138, 148 (Mo. banc 2002).

FN5. *State v. Dunn*, 817 S.W.2d 241, 243 (Mo. banc 1991).

FN6. *State v. Armentrout*, 8 S.W.3d 99, 108 (Mo. banc 1999).

FN7. *In re Care and Treatment of Spencer*, 123 S.W.3d 166, 168 (Mo. banc 2003).

FN8. *Id.*

FN9. *State v. Hall*, 982 S.W.2d 675, 685 (Mo. banc 1998); *State v. Brooks*, 960 S.W.2d 479 (Mo. banc 1997); *State v. Clements*, 849 S.W.2d 640, 647 (Mo.App.1993).

FN10. Rule 30.20.

FN11. All statutory citations refer to RSMo 2000 unless otherwise noted.

FN12. *State v. Taylor*, --- S.W.3d ----, 2004 WL 1049169 (Mo. banc 2004), slip opinion pages 13-14, (SC85235, decided May 11,2004).

FN13. *Lyons v. State*, 39 S.W.3d 32, 43 (Mo. banc 2001).

FN14. Rule 30.25.

FN15. Appellant also brought a claim of instructional error with regard to MAI-CR 3d 302.02, but expressly abandoned that claim per letter to this Court dated March 2, 2004.

FN16. Rules 28.03 and 30.20. See also *State v. Wurtzberger*, 40 S.W.3d 893, 897-98 (Mo. banc 2001).

FN17. *State v. Baker*, 103 S.W.3d 711, 723 (Mo. banc 2003).

FN18. MAI-CR 3d 300.04.2.

FN19. *State v. Johns*, 34 S.W.3d 93, 112 (Mo. banc 2000).

FN20. *Deck*, 994 S.W.2d at 538-39; *Payne v. Tennessee*, 501 U.S. 808, 822-25, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991).

FN21. *Id.*

FN22. *State v. Clark*, 693 S.W.2d 137, 142 (Mo.App.1985). The form of witness examination at trial, whether in a narrative or interrogatory manner, is also a matter committed to discretion of the trial court. *Id.* On direct appeal from Appellant's first convictions and sentences, this Court rejected Appellant's argument that the narrative statement produced emotional

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outbursts so prejudicing his trial that a mistrial was warranted. *Deck*, 994 S.W.2d at 538-39.

FN23. *Deck*, 994 S.W.2d at 543.

FN24. *State v. Bristol*, 98 S.W.3d 107, 115 (Mo.App.2003).

FN25. *State v. Williams*, 97 S.W.3d 462, 474 (Mo. banc 2003).

FN26. *State v. Smith*, 32 S.W.3d 532, 544 (Mo. banc 2000).

FN27. *Id.*

FN28. *Id.*

FN29. The jury found: 1) that each murder was committed while the defendant was engaged in the commission of another unlawful homicide, section 565.032.2(2); 2) that the murders were committed for the purpose of receiving money or any other thing of monetary value, section 565.032.2(4); 3) that the murders were outrageously and wantonly vile, horrible, and inhuman in that they involved depravity of mind, section 565.032.2(7); 4) that the murders were committed for the purpose of avoiding a lawful arrest, section 565.032.2(10); 5) that the murders were committed while defendant was engaged in the perpetration of burglary, section 565.032.2(11); and 6) that the murders were committed while defendant was engaged in the perpetration of robbery, section 565.032.2(11). *Deck*, 994 S.W.2d at 545.

FN30. *State v. Ringo*, 30 S.W.3d 811(Mo. banc 2000).-- *State v. Worthington*, 8 S.W.3d 83, 93 (Mo. banc 1999); *State v. Middleton*, 998 S.W.2d 520 (Mo. banc 1999).

FN31. *State v. Cole*, 71 S.W.3d 163, 171 (Mo. banc 2002).

FN32. *Id.* See also *State v. Tisius*, 92 S.W.3d 751, 766 (Mo. banc 2002).

FN33. Rule 30.25.

2004 WL 1152872, 2004 WL 1152872 (Mo.)

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h e c e e h e

IN THE

MISSOURI SUPREME COURT

STATE OF MISSOURI,	)	
Respondent,	)	
vs.	)	**No. 85443**
CARMAN DECK,	)	
Appellant.	)	

APPELLANT'S MOTION FOR REHEARING

AND SUPPORTING SUGGESTIONS

COMES NOW the appellant, Carman Deck, by and through undersigned counsel, and, pursuant to Missouri Supreme Court Rule 30.26, moves that this Court rehear this cause because the Court has overlooked and misinterpreted material matters of law and fact. In support of this motion, Mr. Deck states as follows:

1. Mr. Deck was convicted of two counts of first-degree murder and was sentenced to death. This Court had previously affirmed the convictions, but reversed the death sentences. Deck v. State, 68 S.W.3d 418 (Mo.banc 2002). On May 25, 2004, this Court affirmed the death sentences.

Penalty Phase Instructions that Ignore this Court's Specific Language

in *State v. Whitfield*

2. In holding that the penalty phase instructions properly instructed the jury on the burden of proof regarding steps 2 and 3 of the death eligibility process, the Court overlooks material matters of law, namely its own holding in State v. Whitfield, 107 S.W.3d 253 (Mo.banc 2003).

3. In Whitfield, this Court specifically held that the state must establish step one and step two and step three of the death eligibility process beyond a reasonable doubt:

> The Supreme Court held [in Ring] that **not just a statutory aggravator, but every fact that the legislature requires be found before death may be imposed** must be found by the jury. And, in determining which factors fall within this rule, Ring cautioned that, "the dispositive question ... 'is one not of form, but of effect.'" *Id.* at 602, 122 S.Ct. 2428, *quoting* Apprendi, 530 U.S. at 494, 120 S.Ct. 2348. **"If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact--no matter how the State labels it must be found by a jury beyond a reasonable doubt."** *Id.* at 602, 122 S.Ct 2428.

Whitfield, 107 S.W.3d at 257 (emphasis added). This Court had already explained in the opinion that "the first three of these steps require factual findings be made in order to render the defendant eligible for the death penalty." *Id.*, at 256. Thus,

this Court acknowledged that not just step one, but steps two and three also, must be found by the jury beyond a reasonable doubt. *Id.*, at 256-57.

4. The death penalty instructions fail, because they fail to instruct the jury that the state must establish steps two and three beyond a reasonable doubt, as Whitfield mandates. Although instructions 16 and 17 were correctly patterned after the MAI-CR3d, the pattern instructions do not conform with the substantive law as set forth by Ring and Whitfield and must be changed. *See* State v. Carson, 941 S.W.2d 518, 520 (Mo.banc 1997) (MAI-CR and its Notes on Use are "not binding" to the extent they conflict with the substantive law).

5. In rejecting this argument, the Court relies on its recent opinion in State v. Taylor, SC#85235. Slip op. at 5. In Taylor, the Court held that since the burden of proof is adequately set forth regarding step one of the death-eligibility process, the jury would automatically know that the same burden of proof applied to steps two and three. Actually, the presence of the burden of proof language as to step one, and the absence of that language as to steps two and three must have led the jurors to believe that there was no such burden as to steps two and three. Nowhere do the instructions tell the jury that the state carries the burden of proof – beyond a reasonable doubt – as to steps two and three. Both this opinion and Taylor must be reconsidered.

Inherently Prejudicial Practice – Shackles and Handcuffs

6. During the entire penalty phase, Carman Deck was forced to wear leg-irons and was handcuffed to a belly chain within full view of the jury.

7. The United States Supreme Court has held that "inherently prejudicial" practices such as shackling "should be permitted only where justified by an essential state interest specific to each trial." Holbrook v. Flynn, 475 U.S. 560, 569 (1986).

8. This Court's opinion conflicts with Holbrook, because it lowers the bar for shackling to such a degree as to authorize shackling for any speculated reason rather than as a last resort to support "an essential state interest specific to each trial." This Court holds that the shackling was justified out of the fear that Mr. Deck might flee, since he was "a repeat offender and evidence from the guilt phase of his trial indicated that he killed his two victims to avoid being returned to custody." Slip op. at 3-4. The trial court failed to set forth any reasons for the shackling; and it failed to show that the shackling was a last resort. We cannot now speculate about and provide those reasons for the trial court. Furthermore, although it's true that Mr. Deck was a repeat offender, his prior offenses were all non-violent: he had been convicted of aiding an escape about twenty years prior to this trial, but had never himself tried to escape (Tr. 402-406). Mr. Deck did nothing to disrupt the proceedings at either this trial or his prior trial. Through this opinion, the Court communicates to trial courts that virtually any justification will

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suffice to fully shackle defendants in full view of the jury. The opinion eviscerates the demanding standard set forth by Holbrook.

9. This Court also holds that, "[n]either being viewed in shackles by the venire panel prior to trial, nor being viewed while restrained throughout the entire trial, alone, is proof of prejudice." Slip op. at 4. But, if that is not enough, how would a defendant ever be able to show prejudice? The opinion seems to require some sort of communication from the jurors, either as a note to the court or as a post-trial affidavit, for the defense to be able to expressly show that the jurors were affected by viewing the defendant in shackles. This would place an undue burden on defense counsel and the jurors who had already made numerous sacrifices of their time and effort.

10. This Court holds that Mr. Deck was not prejudiced by the restraints, because the jury was questioned about the restraints in voir dire and none responded that seeing Mr. Deck in chains would affect them. Slip op. at 4. In Holbrook, however, the United States Supreme Court shot down that very argument. 475 U.S. at 570. There, the state argued that the defendant suffered no prejudice from extra courtroom security, because the jurors were questioned about it in voir dire. *Id.* The Supreme Court recognized that jurors, at the start of the trial, may not be able to articulate how an inherently prejudicial practice like shackling would affect them. *Id.* It held that jurors' responses in voir dire are not dispositive of the prejudice engendered by inherently prejudicial practices like shackling. *Id.* "If 'a procedure employed by the State involves such a probability

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that prejudice will result that it is deemed inherently lacking in due process,' little stock need be placed in jurors' claims to the contrary." *Id.* The Court reasoned that:

> Even though a practice may be inherently prejudicial, jurors will not necessarily be fully conscious of the effect it will have on their attitude toward the accused. This will be especially true when jurors are questioned at the very beginning of proceedings; at that point, they can only speculate on how they will feel after being exposed to a practice daily over the course of a long trial.

Id. The analysis must focus on whether the risk was present, not whether the jurors could recognize the risk. *Id.*

11. In demanding that Mr. Deck show prejudice, the Court overlooks that the Supreme Court has instructed that practices such as shackling are "inherently prejudicial." The proper question should be, "Is there an unacceptable risk of prejudice in having the jury view Mr. Deck while shackled to a belly chain and in leg-irons throughout the entire penalty phase proceedings?" The risk was unacceptable, because there was no need for the shackles, and they were not used as a last resort. The full restraints unjustly presented visual evidence – that Mr. Deck could not confront – that even now, years after his crime, he should be considered an extremely dangerous man who could not behave even within the confines of the courtroom, or that he posed a great risk to escape.

12. The Court finds that trial counsel "made no record of the extent of the jury's awareness of the restraints throughout the penalty phase." Slip op. at 3. The Court overlooks that defense counsel made a record of the shackles prior to trial, during the trial, and after the trial. Shortly after voir dire started, defense counsel objected that Mr. Deck was in leg-irons and handchains and that the restraints prejudiced him toward the jury and made him look dangerous (Tr.74). The statement that the restraints made Mr. Deck appear dangerous to the jury necessarily communicated that the jury could see the restraints. During voir dire, defense counsel spoke to the jury about the restraints, stating that "the other thing about Carman that you all either do or will know is that there's chains on him" (Tr.165). Obviously, the jury was able to see the restraints; otherwise, the comment would have made no sense. Before the jury was sworn, defense counsel requested that the entire jury panel be stricken for cause, because seeing Mr. Deck shackled would make the jurors believe that he is violent and would do something in the courtroom or to the jurors (Tr. 257). In the motion for new trial, defense counsel stated that there were numerous times when the jury clearly saw Mr. Deck – with chains, handcuffs and shackles – paraded in and out of the courtroom or standing when the judge and jury entered or left the room (Supp.L.F.4-5). At no time, did the state ever dispute defense counsel's statements that the jury could see Mr. Deck in the restraints. So too, the prosecutor did not refute defense counsel's statement that there were numerous times when the jury clearly saw Mr. Deck – with chains, handcuffs and shackles – paraded in and out of the courtroom or

standing when the judge and jury entered or left the room (Supp.L.F.4-5). Defense counsel made an adequate record that the jury was able to view the restraints numerous times throughout the trial. This Court must grant rehearing.

Double Hearsay:

Tonia Cummings to Charles Hill to Deputy Thomas to the Jury

13. Mr. Deck argued that the state should not have been allowed to elicit from Deputy Thomas that Charles Hill told her that his former girlfriend, Tonia Cummings, stated that she and Mr. Deck were going to commit "a robbery and possible murder ... in rural DeSoto [of] an elderly gentleman" (Tr.281-82). After eliciting the hearsay testimony from Deputy Thomas, the state referred to the "robbery and possible murder" two more times during her testimony (Tr.282,284). The state also referred to it in closing argument (Tr. 548).

14. In rejecting Mr. Deck's argument, the Court's opinion completely overlooks Crawford v. Washington, 124 S.Ct. 1354 (2004), where the United States Supreme Court held that the Confrontation Clause bars testimonial hearsay, unless the witness is unavailable and the defendant had prior opportunity to cross-examine the witness. *Id.*, at 1365, 1369. Testimonial statements include those like Charles Hill gave to Deputy Thomas, "that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Id.*, at 1364.

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15. "The unpardonable vice of the Roberts test ... is its demonstrated capacity to admit core testimonial statements that the Confrontation Clause plainly meant to exclude." *Id.*, at 1371. That is the same problem here. The Confrontation Clause forbids the introduction of any testimonial out-of-court statement when the declarant is unavailable to testify. Here, the testimonial out-of-court statement was offered as substantive evidence, as well as to explain the police officers' subsequent conduct. The trial court did nothing to ensure that the jury did not consider the evidence substantively; and the state, in fact, urged the jury in closing argument to consider it substantively, over defense counsel objection.

16. This Court holds that "Charles Hill's statement was offered to explain why the police began a search for [Mr. Deck] and a house-to-house search that ultimately led to discovery of the crime scene." Slip op. at 2. In so holding, the Court overlooks the role this testimony played. The hearsay testimony communicated to the jury that before Mr. Deck went into the house, he was contemplating robbing and potentially murdering at least one victim. This testimony directly conflicted with Mr. Deck's statement to the police that he went to the house to rob, and he killed the victims – not because of a thought-out plan to do so – but because he was scared and nervous and didn't know what to do (Ex.69). Without the hearsay testimony, the state had no evidence that Mr. Deck had planned on killing either of the victims before he arrived at the house. The hearsay testimony elevated Mr. Deck from a burglar/robber who placed himself in

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a bad situation and then, under pressure, made an abysmal decision; to a cold-blooded killer who went to the house with a design to rob and kill.

17. This Court holds that "[s]tatements made by out-of-court declarants that explain subsequent police conduct are admissible to supply relevant background information and continuity." Slip op. at 2. The holding overlooks that Hill's out-of-court statement exceeded the scope of any issue relevant to this penalty phase retrial. Hill's hearsay was not even relevant to the initial guilt phase – at the initial trial, the state made its entire case without ever mentioning the specific details of Hill's statement. Details as to why the police searched for Mr. Deck were not relevant to this penalty phase retrial and should have been excluded.

18. The Court's holding overlooks State v. Garrett, 2004 WL 840672 (Mo. App., 4/21/04), and other Missouri caselaw. *See also* State v. Robinson, 111 S.W.3d 510, 514 (Mo.App. 2003); State v. Shigemura, 680 S.W.2d 256, 257-58 (Mo.App. 1984); State v. Kirkland, 471 S.W.2d 191, 194-95 (Mo. 1971). Those cases hold that the state may not elicit out-of-court statements to explain police officers' subsequent conduct as a pretext for eliciting harmful hearsay. Garrett, 2004 WL 840672, at 4-5; Robinson, 111 S.W.3d at 514; Shigemura, 680 S.W.2d at 257-58; Kirkland, 471 S.W.2d at 194-95. The state must avoid eliciting harmful hearsay and can do so by eliciting that the officer engaged in certain conduct "upon information received" rather than going into the details of that information.

Garrett, 2004 WL 840672, at 4-5; Robinson, 111 S.W.3d at 514; Shigemura, 680 S.W.2d at 257-58; Kirkland, 471 S.W.2d at 194-95.

19. Because the hearsay testimony exceeded the scope necessary to explain subsequent police conduct and was the only evidence as to a key point in the jury's determination of Mr. Deck's sentence, this Court must grant rehearing.

WHEREFORE, for the foregoing reasons, Carman Deck requests that this Court withdraw its opinion and grant his motion to rehear this cause, in order to protect Mr. Deck's rights to due process of law, a fair trial, equal protection, presumption of innocence, proof beyond a reasonable doubt, fair, reliable and proportionate sentencing, to confront and cross-examine the witnesses against him, to a trial before a fair/impartial jury, and to be free from cruel and unusual punishment, as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 10, 18(a), 19, and 21 of the Missouri Constitution.

Respectfully submitted,

Rosemary E. Percival, #45292
Office of the State Public Defender
Capital Litigation Division
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Kansas City, Mo. 64016-1910
(816) 889-7699
Counsel for Appellant

CERTIFICATE OF MAILING

I hereby certify that a copy of the foregoing was mailed, postage prepaid, to: Evan Buchheim, The Office of the Attorney General, 1530 Rax Court, Second Floor, Jefferson City, MO 65109, on the 8th day of June, 2004.

Rosemary E. Percival

Rosemary E. Percival

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July 1, 2004

Ms. Rosemary E. Percival
Office of State Public Defender
Suite 200
818 Grand
Kansas City, MO 64106

In Re: State of Missouri, Respondent, vs. Carman L. Deck, Appellant.
Missouri Supreme Court No. SC85443

Dear Ms. Percival:

Please be advised that the Court entered the following order on this date in the above-entitled cause:

"Appellant's motion for rehearing overruled. Execution set for October 8, 2004."

Very truly yours,

THOMAS F. SIMON

Cynthia L. Turley
Deputy Clerk, Court en Banc

cc
Mr. Evan J. Buchheim/Office of Missouri Attorney General

No. SC85443

Jefferson County Circuit Court Case No. CR196-1084FXJ2

In the Supreme Court of Missouri

May Term, 2004

State of Missouri,

Respondent,

v. APPEAL FROM THE CIRCUIT COURT OF JEFFERSON COUNTY

Carmen Deck,

Appellant.

Now at this day come again the parties aforesaid, by their respective attorneys, and the Court here being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said Circuit Court of Jefferson County rendered, be in all things affirmed, and stand in full force and effect; and that the said respondent recover against the said appellant its costs and charges herein expended, and have execution therefor. It is further considered and adjudged by the Court that the sentence pronounced against the said Carmen Deck, appellant herein, by the said Circuit Court of Jefferson County be in all things executed on Friday the 8th day of October, 2004.

(Opinion filed.)

STATE OF MISSOURI-Sct.

I, THOMAS F. SIMON, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the May Session thereof, 2004, and on the 25th day of May 2004, in the above entitled cause.

Given under my hand and seal of said Court, at the City of Jefferson, this 1st day of July 2004.

Clerk

D.C.

ORIGINAL

(8)

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No. 04-5293
(CAPITAL CASE)

IN THE
SUPREME COURT OF THE UNITED STATES

CARMAN L. DECK,

Petitioner,

v.

STATE OF MISSOURI,
Respondent.

On Petition for Writ of Certiorari
to the Supreme Court of Missouri

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Petitioner, Carman L. Deck, was convicted in the Circuit Court of Jefferson County, Missouri, of two counts of first-degree murder and given two death sentences. The facts of this case are summarized in the opinion of the Missouri Supreme Court affirming Petitioner's first-degree murder convictions and death sentences. *See State v. Deck*, 994 S.W.2d 527 (Mo. banc 1999), *cert. denied*, 528 U.S. 1009 (1999). Later, during Petitioners's appeal from the denial of post-conviction relief, the Missouri Supreme Court set aside Petitioner's death sentences and remanded this case for retrial of the penalty phase. *See Deck v. State*, 68 S.W.3d 418 (Mo. banc 2002). The penalty phase was subsequently retried and the jury again recommended, and the trial court imposed, two death sentences, which sentences were affirmed by the Missouri Supreme Court. *See State v. Deck*, 136 S.W.3d 481 (Mo. banc 2004). Petitioner now seeks certiorari of the Missouri Supreme Court's decision affirming these death sentences.

ARGUMENT

A petition for writ of certiorari must present a compelling reason for granting the petition. Compelling reasons are: a) that a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals; and, b) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important question in a way that conflicts with relevant decisions of this Court. Sup. Ct. R. 10. This case involves no important question of federal law, much less one that has been decided in conflict with this Court's decisions.

Restraints During Penalty Phase Retrial

Petitioner contends the trial court's use of restraints during the penalty phase retrial violated the Constitution. But his failure to demonstrate a compelling reason why this Court should grant his petition for a writ of certiorari is twofold. First, he failed to make an adequate record before the trial court on the restraint issue. And, second, this Court has upheld the use of restraints during a criminal proceeding, and has never held that use of restraints are per se unconstitutional.

1. The use of restraints at Petitioner's trial.

Before the penalty phase retrial, the trial court ordered that Petitioner be allowed to dress in court clothes for trial, but overruled his motion to appear free from restraints and shackles. During voir dire, but outside the presence of the jury, the trial court again overruled Petitioner's objection to wearing leg irons and a belly chain. During voir dire, Petitioner's counsel raised the restraint issue before the venire panel by asking whether anyone would be affected by Petitioner's shackles; no one responded that it would have any affect. *Deck*, 136 S.W.3d at 485.

Other than directing the venire panel's attention to Petitioner's restraints, Petitioner "made no record of the extent of the jury's awareness of the restraints." *Id.* Moreover, no record was made that the restraints "impeded [Petitioner] from participating in the proceedings." *Id.* Finally, the Missouri court found that Petitioner was a flight risk "in that he was a repeat offender and evidence from the guilt phase of his trial indicated that he killed his two victims to avoid being returned to custody." *Id.*

Without a contemporaneous and detailed record concerning the type and extent of restraints applied to Petitioner during the penalty phase retrial, granting his petition for a writ of certiorari on this issue would be pointless. This Court has never held that the use of restraints during a criminal

proceeding is per se unconstitutional. Consequently, the lack of an adequate record concerning the restraint issue does not allow this Court to issue an opinion that would provide useful guidance to lower courts.

Nothing in the record reveals how noticeable Petitioner's restraints were to the jury, or how aware the jurors were of the restraints until Petitioner directed their attention to them during voir dire. Nothing in the record shows that the jury could see the leg restraints, or even the belly chain, while Petitioner was seated. The record does not reflect whether the jurors saw Petitioner being led into the courtroom in restraints, or, what's more likely, whether he was already seated when jurors were brought into court. Finally, Petitioner made no showing that the restraints hindered his ability to participate in the proceedings.

This case did not involve a penalty phase that was conducted immediately after a guilt-phase trial in which Petitioner had not been shackled, but was a retrial of a penalty phase conducted years after the initial finding of guilt. The jury picked for this retrial – obviously not the same one that initially decided Petitioner's guilt – was repeatedly told both before and during the retrial that Petitioner had already been found guilty of a double-homicide.

This case also presented security concerns not present in other penalty phase proceedings. Petitioner, who had already spent several years in prison, was aware that the guilty verdicts for both counts of first-degree murder had been upheld on both his direct and post-conviction appeals. Other convicted murderers, even those sentenced to death, can appeal hoping for a new guilt-phase trial on appeal. But the only issue that remained for Petitioner was whether he would die or spend the rest of his life in prison; and he had already been sentenced to death once before for these murders.[1]

Petitioner neither sought a hearing on the necessity of the restraints, nor offered an alternative to the restraints then being used. Petitioner claimed prejudiced simply because he was restrained, yet he made no contemporaneous record suggesting that any further inquiry into the matter was necessary.

2. Restraints and the presumption of innocence.

The idea that a criminal defendant should appear free from restraints and not be forced to wear prison clothing derives from the presumption of innocence to which each defendant is entitled. *Holbrook v. Flynn*, 475 U.S.

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[1]Under Missouri law, the only possible sentence for a person convicted of first-degree murder is either death or life imprisonment without the possibility of parole. Mo. Rev. Stat. § 565.020.2 (2000).

560, 567 (1986). On the other hand, not every practice that singles out the accused from others in the courtroom is inherently unconstitutional:

> This does not mean, however, that every practice tending to single out the accused from everyone else in the courtroom must be struck down. Recognizing that jurors are quite aware that the defendant appearing before them did not arrive there by choice or happenstance, we have never tried, and could never hope, to eliminate from trial procedures every reminder that the State has chosen to marshal its resources against a defendant to punish him for allegedly criminal conduct. To guarantee a defendant's due process rights under ordinary circumstances, our legal system has instead placed primary reliance on the adversary system and the presumption of innocence.

Id. In *Holbrook*, this Court held that a robbery defendant's constitutional rights were not violated during his joint trial with five co-defendants when normal courtroom security was supplemented by four uniformed state troopers seated in the first row of the spectator's section. *Id.* at 571-72.

This Court has relied on the presumption of innocence in other cases involving security concerns:

> To implement the presumption [of innocence], courts must be alert to factors that may undermine the fairness of the fact-finding process. In the administration of criminal justice, courts must carefully guard against dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt.

Estelle v. Williams, 425 U.S. 501, 503 (1976). In *Estelle*, this Court held that a State cannot constitutionally compel a criminal defendant to wear prison clothes during trial, but distinguished this from the use of restraints because "[u]nlike physical restraints . . . compelling an accused to wear jail clothing

furthers no essential state policy."[2] *Id.* at 505. Petitioner also relies on *Illinois v. Allen*, 397 U.S. 337 (1970), but that case does nothing to advance his argument since it involved a criminal defendant's Sixth Amendment right to be present at his own trial after he was removed from the courtroom for abusive and disruptive behavior.

3. The use of restraints during a capital trial's penalty phase.

Petitioner's argument is grounded on the presumption of innocence. But this presumption is not a concern during the penalty phase of a capital-murder trial after the defendant has been found guilty of first-degree murder. *See State v. Young*, 853 P.2d 327, 350 (Utah 1993); *Duckett v. State*, 752 P.2d 752, 755 (Nev. 1988); *Bowers v. State*, 507 A.2d 1072, 1081 (Md. 1986), *cert. denied*, 479 U.S. 890 (1986). As Petitioner concedes, this Court has never held that the use of restraints during a penalty phase is per se unconstitutional. In fact, it has never held that it is unconstitutional to use restraints during any criminal trial. In considering courtroom security issues, this Court has rejected an approach that presumes all security practices are inherently prejudicial, but has instead adopted a case-by-case method in reviewing such claims. *See Holbrook*, 475 U.S. at 569. Using this

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[2]In *Estelle*, the Court found no constitutional violation because nothing in the record showed that the defendant was "compelled" to wear prison clothes at trial. *Id.* at 512.

method to review the restraint issue in Petitioner's case is made all the more difficult by his failure to make a contemporaneous, detailed record at trial.

Even if such a record had been made, the presumption of innocence is not an issue in this case. The retrial of Petitioner's penalty phase occurred years after a jury in 1998 found him guilty of two counts of murder. Not only have these guilt-phase verdicts been upheld after both direct and state post-conviction appeals, but the jury was constantly reminded by both sides throughout the penalty phase retrial that Petitioner had been found guilty of two counts of first-degree murder.

The Missouri Supreme Court has upheld the use of restraints during criminal proceedings. *See State v. Kinder*, 942 S.W.2d 313, 330 (Mo. banc 1997), *cert. denied*, 522 U.S. 854 (1997) (defendant required to wear leg shackles during part of guilt phase in capital-murder trial); *State v. Amrine*, 741 S.W.2d 665, 675 (Mo. banc 1987), *cert. denied*, 486 U.S. 1017 (1988) (defendant's legs shackled to chair during entire trial on capital murder charge); *see also State v. Brooks*, 960 S.W.2d 479 (Mo. banc 1998), *cert. denied*, 524 U.S. 957 (1998) (trial court did not abuse its discretion in failing to declare a mistrial after the jury witnessed the defendant being handcuffed immediately after the guilt-phase verdicts were read and before the penalty phase began). In *State v. Hall*, 982 S.W.2d 675 (Mo. banc 1999), *cert. denied*,

526 1151 (1999), the Missouri Supreme Court held that the trial court did not err in overruling the defendant's objection to his wearing "leg and waist shackles during the penalty phase." *Id.* at 685.

During the federal habeas proceeding that followed the Missouri Court's decision in *Hall*, the Eighth Circuit also found no constitutional violation when it considered the restraint issue. *Hall v. Luebbers*, 296 F.3d 685 (CA8 2002), *cert. denied*, 538 U.S. 951 (2003). The federal court found no evidence in the record either that the jurors ever saw the leg and waist shackles or that the shackles hindered the defendant's ability to participate in the proceedings. *Id.* at 698-99. The court also rejected the argument (also advanced by Petitioner in this case) that the use of the shackles during the penalty phase improperly affected the jury's sentencing decision:

> We do not find persuasive any contention that the use of shackles during the penalty phase would necessarily lead jurors to conclude that they must impose a death sentence. These jurors had already found Hall guilty of first degree murder and could have found shackles to be a reasonable security measure.

Id. at 699 (citation omitted).[3]

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[3]The omitted citation is to *Elledge v. Dugger*, 823 F.2d 1439 (CA11 1987), *opinion withdrawn in part*, 833 F.3d 250, *cert. denied*, 485 U.S. 1014 (1988), a case on which Petitioner relies. The conclusion with which the Eighth Circuit disagree – that penalty-phase jurors seeing shackles would impose death – was relied on in *Elledge* to find a constitutional violation. *Id.* at 1450. But, as explained below, the decision in *Elledge* rested on the trial court's failure to follow procedural requirements in determining whether

The cases on which Petitioner relies do not assist him here. Most of these cases do not involve a finding that the trial court violated the Constitution by using restraints, but instead turn on the trial court's failure to follow court-imposed procedural requirements before using restraints. *Duckett v. Godinez*, 67 F.3d 734, 748-50 (CA9 1995), *cert. denied*, 517 U.S. 1158 (1996) (ordering new penalty phase when the state trial court failed to make a record showing compliance with that circuit's "two-step" process before restraining a defendant); *Bello v. State*, 547 So.2d 914 (Fla. 1989) (ordering new penalty phase when the trial court failed to honor the defendant's request for an inquiry into the need for shackling); *Laird v. Horn*, 159 F. Supp.2d 58, 101-02 (E.D. Pa. 2001) (ordering new penalty phase when the state trial court failed to conduct a hearing or make findings on the record on the need for shackling); *Elledge v. Dugger*, 823 F.2d at 1451-52 (ordering a new penalty phase when the state trial court failed to conduct a hearing or make a record showing that shackling was necessary);[4] *Lovell v. State*, 702

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restraints were necessary.

[4]Petitioner relies heavily on *Elledge*, but the opinion in that case concludes that a "case-by-case" approach to the issue is inconsistent with controlling precedent. 823 F.2d at 1450-51. This statement is directly contrary to this Court's holding in *Holbrook*, which mandated a case-by-case approach. Ironically, the Eleventh Circuit purportedly relies on *Holbrook* in reaching its judgment. *Id.* The majority opinion in *Elledge* was not even accepted by all the judges on the Eleventh Circuit as reflected by the opinion of the dissenting judge and the several judges who dissented from the court's

A.2d 261, 273-74 (Md. 1997) (ordering a new penalty phase when the trial court failed to make an adequate record showing the need for shackling).[5]

This Court has never suggested that the Constitution requires that any particular procedure be followed before restraining a convicted murderer, but has instead relied on a case-by-case approach in resolving issues concerning restraints. What types of procedures trial courts must employ in making this determination does not involve constitutional issues. In the end, each case stands or falls on its own facts. Petitioner's desire to create a uniform rule to control these types of inquiries is simply an attempt to constitutionalize the method or procedure in making this inquiry and to make any deviation from those procedures a constitutional violation. But the manner of inquiry for the fact-specific inquiry regarding restraints is not something of constitutional

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refusal to hear the case en banc. *See Elledge v. Dugger*, 833 F.2d 250 (CA11 1987); *see also People v. Seaton*, 28 P.3d 175 (Cal. 2001), *cert. denied*, 535 U.S. 1036 (2002).

[5]Petitioner's reliance on *Tyars v. Finner*, 709 F.2d 1274 (CA9 1983) and *Lemons v. Skidmore*, 985 F.2d 354 (CA7 1993) also does not assist him since both involved civil, not criminal proceedings. *Tyars* involved the trial court restraining a severely retarded man before the jury during an involuntary civil commitment proceeding when no record had been made concerning the need for restraints. *Id.* at 1284-85. *Lemons* involved restraining the plaintiff, an inmate, during the civil jury trial on his § 1983 lawsuit against prison guards. *Lemons*, 985 F.2d at 356. In addition, the court in *Lemons* did not reach the constitutional issue but only addressed what procedures district courts must follow in determining whether restraints are warranted. *Id.* at 356-59.

dimension. but is simply a matter of procedure best left to the discretion of state courts.

CONCLUSION

Petitioner's petition for a writ of certiorari should be denied.

Respectfully submitted,

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STATE OF MISSOURI

04-5293

CERTIFICATE OF SERVICE

I hereby certify that I am a member of the Bar of this Court and that twelve true and correct copies of the Respondent's Brief in Opposition to Petition for Writ of Certiorari in the case of Carman L. Deck v. State of Missouri, No. 04-5293 were mailed, pursuant to Supreme Court Rules 29.2 and 29.5(b), postage prepaid, this 27th day of September, 2004, to:

William K. Suter, Clerk
United States Supreme Court
1 First Street, N.E.
United States Courthouse
Washington, D.C. 20543

Further, I hereby certify that three true and correct copies of the foregoing documents in this cause were mailed pursuant to Supreme Court Rule 29.5(b), postage prepaid, this 27th day of September, 2004, to:

Rosemary E. Percival
Office of Appellate Defender
818 Grand Boulevard, Suite 200
Kansas City, MO 64106-1910

Evan J. Buchheim

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DEC 16

No. 04-5293

In The
Supreme Court of the United States

CARMAN DECK,

Petitioner,

v.

STATE OF MISSOURI,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Missouri

JOINT APPENDIX

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Petition For Certiorari Filed July 15, 2004
Certiorari Granted October 18, 2004

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RELEVANT DOCKET ENTRIES

July 9, 1996	Charges filed against Deck in the Circuit Court of Jefferson County, Missouri, Case No. CR196-1084.
February 17, 1998	Court orders that Deck will be restrained in leg braces for trial.
February 18, 1998	Trial commences.
February 20, 1998	Deck is found guilty of all counts.
February 21, 1998	Jury recommends that Deck be sentenced to death.
April 27, 1998	Court imposes two death sentences.
April 30, 1998	Deck files Notice of Appeal.
June 1, 1999	Missouri Supreme Court affirms sentences and convictions.
September 27, 1999	Deck files a motion for postconviction relief in the Circuit Court of Jefferson County.
October 17, 2000	Circuit Court hears evidence (through in-court and deposition testimony) on claims for postconviction relief.
November 1, 2000	Circuit Court denies motion for postconviction relief.
February 26, 2002	Missouri Supreme Court reverses Circuit Court's denial of postconviction relief and remands for a new penalty phase.
April 29, 2003	Penalty phase retrial commences.
April 29, 2003	Deck files "Motion to Have Accused Appear at Trial Free of Restraints."

May 1, 2003	Jury recommends that Deck be sentenced to death.
May 27, 2003	Deck files a motion for new trial.
June 30, 2003	Circuit Court denies motion for new trial and imposes two death sentences.
July 10, 2003	Deck files Notice of Appeal.
May 25, 2004	Missouri Supreme Court affirms death sentences.
July 15, 2004	Petition for Writ of Certiorari filed.
October 18, 2004	Certiorari granted.

23RD JUDICIAL CIRCUIT

Date 2/23/98

DOCKET SHEET FOR CR196-1084

ST VS: DECK, CARMEN L

* * *

1/10/97 ATTORNEY FOR THE DEFENDANT FILES MOTION FOR A PSYCHOLOGICAL ASSESSMENT PRUSUANT [sic] TO SECTION 552.020 RSMO TO BE PERFORMED BY ROSALYN SCHULTZ PH.D.
DEFENDANT FILES ORDER TO ADMIT PSYCHOLOGIST ROSALYN SCHULTZ PH.D. INTO THE JAIL TO CONDUCT A PSYCHOLOGICAL EVALUATION OF INMATE CARMEN DECK JR.
DEFENDANT FILES NOTICE AND REQUEST THE MOTION FOR PSYCHOLOGICAL ASSESSMENT BE CALLED ON JANUARY 13, 1997 AT 9:00 AM.
----------Nancee Bourisaw--

* * *

1/31/97 COPY OF CORRESPONDENCE FROM PUBLIC DEFENDER TO COURT.
ATTORNEY FOR THE DEFENDANT FILES MOTION FOR A PSYCHOLOGICAL ASSESSMENT PURSUANT TO SECTION 552.020 RSMO TO BE PERFORMED BY ROSALN [sic] SCHULTZ PHD.
COURT FILES ORDER FOR THE JAIL TO ADMIT PSYCHOLOGIST ROSALYN SCHULTZ PFD INTO THE JAIL FOR THE PURPOSE OF CONDUCTION [sic] A PSYCHOLOGICAL EVALUATION FOR CARMEN DECK JR.
----------Nancee Bourisaw--

* * *

3/10/97 ROSALYN SCHULTZ, PH.D., FILES PSYCHOLOGICAL EXAMINATION
----------Kelly Noeth--

* * *

Office of Circuit Clerk

HOWARD WAGNER

State of Missouri — Div. No. 2

VS

Carmen Deck

In the CIRCUIT COURT JEFFERSON COUNTY, MISSOURI

Docket No.

Case No. CR196-1084-FX-J2 — February 17 19 98

MEMORANDUM

6 or 12 JURORS — COURT REPORTER
WITNESS OATH — APPT. AD. LITEM ATTY.

Comes now the Court and orders the Defendant to be restrained in leg braces and dressed in civilian clothes.

SO ORDERED: /s/ Gary P. Kramer
CIRCUIT JUDGE, DIVISION TWO

188

SO ORDERED:

PLF. ATTORNEY **DEF. ATTORNEY**

994 S.W.2d 527

Supreme Court of Missouri,
En Banc.

STATE of Missouri, Respondent,
v.
Carmen L. **DECK**, Appellant.

No. 80821.

June 1, 1999.
Rehearing Denied June 29, 1999.

Deborah B. Wafer, St. Louis, for Appellant.

Jeremiah W. (Jay) Nixon, Atty. General, Catherine Chatman, Assistant Attorney General, Jefferson City, for Respondent.

STEPHEN N. LIMBAUGH, Jr., Judge.

A Jefferson County jury convicted **Carmen** L. **Deck**, Jr., of two counts of first degree murder, two counts of armed criminal action, one count of first degree robbery, and one count of first degree burglary. Deck was sentenced to death for each of the two murder counts and concurrent life sentences for the two counts of armed criminal action, as well as consecutive sentences of thirty years imprisonment for the robbery count and fifteen years imprisonment for the burglary count. This Court has jurisdiction of the appeal because the death sentence was imposed. Mo. Const. art. V, sec. 3. The judgment is affirmed.

I. Facts

Viewed in the light most favorable to the verdict, *State v. Rousan,* 961 S.W.2d 831 (Mo. banc), *cert. denied,* 524 U.S. 961, 118 S.Ct. 2387, 141 L.Ed.2d 753 (1998), the facts

are as follows: In June 1996, Deck planned a burglary with his mother's boyfriend, Jim Boliek, to help Boliek obtain money for a trip to Oklahoma. Deck targeted James and Zelma Long, the victims in this case, because he had known the Longs' grandson and had accompanied him to the Longs' home in DeSoto, Missouri, where the grandson had stolen money from a safe. The original plan was to break into the Longs' home on a Sunday while the Longs were at church. In preparation for the burglary, Deck and Boliek drove to DeSoto several times to canvass the area.

On Monday, July 8, 1996, Boliek told Deck that he and Deck's mother wanted to leave for Oklahoma on Friday, and he gave Deck his .22 caliber High Standard automatic loading pistol. That Monday evening, Deck and his sister, Tonia Cummings, drove in her car to rural Jefferson County, near DeSoto, and parked on a back road, waiting for nightfall. Around nine o'clock, Deck and Cummings pulled into the Longs' driveway.

Deck and Cummings knocked on the door and Zelma Long answered. Deck asked for directions to Laguana Palma, whereupon Mrs. Long invited them into the house. As she explained the directions and as Mr. Long wrote them down, Deck walked toward the front door and pulled the pistol from his waistband. He then turned around and ordered the Longs to go lie face down on their bed, and they complied without a struggle.

Next, Deck told Mr. Long to open the safe, but because he did not know the combination, Mrs. Long opened it instead. She gave Deck the papers and jewelry inside and then told Deck she had two hundred dollars in her purse in the kitchen. Deck sent her into the kitchen and she brought the money back to him. Mr. Long then told Deck

that a canister on top of the television contained money, so Deck took the canister, as well. Hoping to avoid harm, Mr. Long even offered to write a check.

Deck again ordered the Longs to lie on their stomachs on the bed, with their faces to the side. For ten minutes or so, while the Longs begged for their lives, Deck stood at the foot of the bed trying to decide what to do. Cummings, who had been a lookout at the front door, decided time was running short and ran out the door to the car. Deck put the gun to Mr. Long's head and fired twice into his temple, just above his ear and just behind his forehead. Then Deck put the gun to Mrs. Long's head and shot her twice, once in the back of the head and once above the ear. Both of the Longs died from the gunshots.

After the shooting, Deck grabbed the money and left the house. While fleeing in the car, Cummings complained of stomach pains, so Deck took her to Jefferson Memorial Hospital, where she was admitted. Deck gave her about two hundred fifty dollars of the Long's money and then drove back to St. Louis County. Based on a tip from an informant earlier that same day, St. Louis County Police Officer Vince Wood was dispatched to the apartment complex where Deck and Cummings lived. Officer Wood confronted Deck late that night after he observed him driving the car into the apartment parking lot with the headlights turned off. During a search for weapons, Officer Wood found a pistol concealed under the front seat of the car and, then, placed Deck under arrest. Deck later gave a full account of the murders in oral, written and audiotaped statements.

II. Motion for Change of Venue

Deck first contends that the trial court erred in overruling his motion for change of venue filed under Rule 32.04. As grounds for the motion, he stated that "the case ha[d] received extensive publicity by way of newspaper and television coverage" and that "[t]he residents of Jefferson County [were] biased and prejudiced against defendant and defendant [could] not receive a fair trial." The trial court overruled the motion after an evidentiary hearing, finding that there was not "such overwhelming pre-trial publicity as is likely to render impossible the selection of an impartial jury." Deck now claims that the trial court's error violated his rights to due process of law, trial by fair and impartial jury, reliable sentencing, and freedom from cruel and unusual punishment as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and article I, sections 10, 18(a), and 21 of the Missouri Constitution.

A change of venue is required when it is necessary to assure the defendant a fair and impartial trial. *State v. Kinder,* 942 S.W.2d 313, 323 (Mo. banc 1996). The decision to grant or deny a request for change of venue for cause rests within the trial court's discretion, *State v. Feltrop,* 803 S.W.2d 1, 6 (Mo. banc 1991), and the trial court's ruling will not be reversed absent a clear showing of abuse of discretion and a real probability of injury to the complaining party. *Id.* A trial court abuses its discretion, however, when the record shows that the inhabitants of the county are so prejudiced against the defendant that a fair trial cannot occur there. *Id.; Kinder,* 942 S.W.2d at 323. In reviewing the trial court's ruling, it is understood that the trial court, rather than the appellate court, is in the better position to assess the effect of publicity on the

members of the community. *Feltrop*, 803 S.W.2d at 6. Finally, in assessing the impact of potentially prejudicial publicity on prospective jurors, the critical question is not whether they remember the case, but whether they have such fixed opinions regarding the case that they could not impartially determine the guilt or innocence of the defendant. *Id.*

At the hearing on the motion, Deck introduced into evidence nine newspaper articles and several videotapes of television news broadcasts, all of which appeared within a few weeks of the July 8 murders. In addition, Deck offered the testimony of Dr. Kenneth Warren, a professor of political science at Saint Louis University, who was commissioned to conduct an opinion poll to determine the extent to which residents of Jefferson County had heard of the case. Dr. Warren's poll, which was taken between November 13, 1996 and December 9, 1996, more than a year before trial, consisted of a survey of five hundred eighteen residents of Jefferson County. The results showed that sixty-nine percent of the people polled were aware of the case and twenty-seven percent held an opinion regarding Deck's guilt. These circumstances, Deck maintains, demonstrate that the Jefferson County community was saturated with publicity about the case that was prejudicial to him, and thus the trial court abused its discretion in overruling his motion for change of venue.

To reinforce his position, Deck also notes that during jury selection, fifty of the prospective jurors indicated that they had heard about or read about the case. Thirteen of the fifty stated that they had formed opinions regarding Deck's guilt based on the publicity and that it would be difficult or impossible for them to render a fair and impartial verdict. Deck renewed his motion for change of venue

at that point, and the trial court again overruled the motion.

The fact that so many residents of Jefferson County were aware of the case does not alone mandate a change of venue. Although Dr. Warren testified that sixty-nine percent of the residents polled were aware of the case, he conceded on cross-examination that with the passage of time, fewer people would remember what they had heard. Further, although twenty-seven percent said that they held an opinion regarding Deck's guilt, Dr. Warren did not inquire whether those opinions would keep them from following the law and making a determination based on the evidence adduced at trial. As to the prospective jurors, the key concern, as noted, is whether those jurors who had heard about the case held such fixed opinions that they could not make an impartial determination regarding the defendant's guilt. *Feltrop*, 803 S.W.2d at 6. During voir dire, only thirteen of the fifty prospective jurors who had heard about the case stated that their opinions would keep them from being fair and impartial jurors, and of those thirteen, twelve were stricken for cause or otherwise excused. Defense counsel declined to strike the remaining person who apparently changed her response by stating that she had not formed an opinion and could indeed follow the instructions and consider only the evidence at trial. Given the limited inferences that can be made from the polling data and the trial court's effective handling of the voir dire process, there is no indication that Deck was denied a fair and impartial jury.

Citing *Ainsworth v. Calderon*, 138 F.3d 787, 795 (9th Cir.1998), Deck further claims that the pretrial publicity in Jefferson County should be considered presumptively prejudicial. According to *Ainsworth*, "[p]rejudice is presumed

when the record demonstrates that the community where the trial was held was saturated with prejudicial and inflammatory media publicity about the crime." *Id.* Prejudice occurs, for instance, where there is "a barrage of inflammatory publicity immediately prior to trial amounting to a huge . . . wave of public passion." *Id.* (quoting *Patton v. Yount,* 467 U.S. 1025, 1033, 104 S.Ct. 2885, 81 L.Ed.2d 847 (1984)). Under *Ainsworth,* courts should also consider whether the media accounts were primarily factual and whether the accounts contained inflammatory, prejudicial information that was not admissible at trial. *Id.* Under the facts of *Ainsworth,* however, the court determined that the media coverage was not presumptively prejudicial because the coverage was factual in nature and occurred, for the most part, several months before trial. *Id.* The case at hand is similar: The media accounts were factual in nature and occurred long before trial, and there was no "barrage of inflammatory publicity immediately prior to trial."

The evidence presented at the hearing on Deck's motion for change of venue and during voir dire did not show that the residents of Jefferson County were so prejudiced against him that a fair trial could not occur. As such, the trial court did not abuse its discretion in denying the motion for a change of venue.

III. Motion to Suppress

Deck next claims that the trial court erred by overruling his motion to suppress and in admitting at trial the statements he made to the police as well as the pistol and other items seized from his car. In support of his claim, Deck states that Officer Wood did not have "reasonable

suspicion" to stop him on the parking lot, and therefore the stop was unlawful. As a result, he contends, the evidence seized and his incriminating statements should have been excluded as "fruit of the poisonous tree." Deck concludes that introduction of the evidence at trial violated his rights to due process of law, to be free from unreasonable search and seizure, to reliable sentencing, and to be free from cruel and unusual punishment under the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution and article I, sections 10, 15, 18(a), and 21 of the Missouri Constitution.

At a hearing on a motion to suppress and ultimately at trial, the state has the burden to justify a warrantless search and seizure. *State v. Villa-Perez,* 835 S.W.2d 897, 902 (Mo. banc 1992). In reviewing the trial court's ruling on the matter, this Court considers the record made at the suppression hearing as well as the evidence introduced at trial. *State v. Hohensee,* 473 S.W.2d 379, 380 (Mo.1971); *State v. Howard,* 973 S.W.2d 902, 908 (Mo.App.1998).

The Fourth Amendment of the United States Constitution preserves the right of the people to be secure against unreasonable searches and seizures. Missouri's constitutional "search and seizure" guarantee, article I, section 15, is co-extensive with the Fourth Amendment. *State v. Rushing,* 935 S.W.2d 30, 34 (Mo. banc 1996). A warrant based upon probable cause is generally required to justify a search or seizure. However, the Fourth Amendment does not prohibit a so-called "*Terry*" stop – a stop followed by a "frisk" or "pat-down" for weapons – that is based on reasonable suspicion supported by articulable facts that the person stopped is engaged in criminal activity. *Terry v. Ohio,* 392 U.S. 1, 30, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). *Terry* "stop and frisk" principles have

been extended to motor vehicle stops so that police who have the requisite reasonable suspicion may conduct a "search of the passenger compartment of an automobile, limited to those areas in which a weapon may be placed or hidden. . . ." *Michigan v. Long,* 463 U.S. 1032, 1049, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983). "Reasonable suspicion," which is a less demanding standard than "probable cause," *Alabama v. White,* 496 U.S. 325, 330, 110 S.Ct. 2412, 110 L.Ed.2d 301 (1990), is to be determined by reference to the "totality of the circumstances." *Id.* (citing *United States v. Cortez,* 449 U.S. 411, 417, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981)).

Although the state's evidence presented at the suppression hearing and at trial was uncontested, a more detailed recitation of that evidence is necessary to evaluate the grounds for reasonable suspicion. On the day of the murders, an individual identified as Charles Hill told the Jefferson County Sheriff's Office that he believed that Deck and his sister were involved in a robbery and/or homicide in Jefferson County, that they would be driving a gold two-door car, and that they probably were armed. This information was relayed to the St. Louis County Police, and Officer Woods was dispatched to locate Deck and his sister at their last known address, an apartment complex in St. Louis County.

Sometime after 11 o'clock at night, Officer Wood, who was parked in his vehicle on the side of the road at the apartment complex, saw Deck drive by alone in a two-door gold car and pull into a parking space. The lights to Deck's car were not illuminated even though it was dark. Officer Wood walked toward Deck's car, identified himself as a police officer, and shined his flashlight into the car, whereupon Deck turned away from him and leaned down

toward the passenger side of the vehicle. At that point, Officer Wood ordered Deck to sit up and show his hands, and when Deck complied, Officer Wood then asked him to get out of the car. Once outside the car, Officer Wood patted Deck down for weapons, and finding none, then searched the passenger side of the vehicle while a back-up officer detained Deck. When the search revealed a pistol concealed underneath the front seat, Officer Wood placed appellant under arrest for unlawful use of a weapon. The police then impounded the vehicle, and during an inventory search, Officer Wood found the victims' decorative tin filled with coins on the vehicle's floorboard. As noted, Deck later made oral, written, and taped statements.

Deck's primary argument, as we understand it, is that he was unlawfully stopped, or "seized," for the offense of driving without lights when Officer Wood first approached him as he parked the car. As Deck explains, there was no probable cause to be stopped because the statute defining the offense, section 307.040.1, RSMo 1994, applies only to public streets and highways, not to private parking lots like the one at the apartment complex. Regardless of the presence or absence of probable cause under the statute, however, Deck's argument fails because no stop or seizure took place when Officer Wood first approached the car. A person is not "seized" until either being subjected to the application of physical force by the police or by voluntarily submitting to the assertion of police authority. *California v. Hodari D.,* 499 U.S. 621, 626, 111 S.Ct. 1547, 113 L.Ed.2d 690 (1991). Here, Officer Wood did not stop Deck's car, nor did he display his weapon as he approached the vehicle, and instead he merely identified himself and said something like "how you doing?" Under these circumstances, Deck was not subject to the physical control of

Officer Wood nor did he submit to Officer Wood's authority when the officer approached the vehicle.

That is not to say, however, that Officer Wood could not have lawfully stopped Deck when he first saw him. Even if there was no probable cause to stop Deck for the *offense* of driving without lights, the *act* of driving without lights late at night in a residential parking lot was some indication that criminal activity was afoot, separate from the offense of driving without lights, itself. That evidence, when coupled with the information relayed by the dispatcher to Officer Wood – that Deck and his sister would be driving a two-door gold car and should be considered armed and dangerous – constituted "reasonable suspicion" that would justify a "*Terry*" stop, at the least.

Notwithstanding Officer Wood's justification to stop Deck when he first pulled into the parking lot, the actual stop or seizure did not occur until later in the sequence of events when even more evidence developed that gave rise to "reasonable suspicion." Deck's reaction to the initial encounter with Officer Woods was to turn away and reach down toward the passenger side of the vehicle as if he was reaching for something or attempting to conceal something. Only when Officer Wood ordered Deck to sit up and display his hands, and Deck then complied, thereby submitting to the assertion of police authority, did the seizure occur. *See Hodari D.*, 499 U.S. at 626, 111 S.Ct. 1547. The state's evidence was more than ample to support a reasonable and articulable suspicion that Deck was engaged in criminal activity. *See State v. Hunter,* 783 S.W.2d 493, 495 (Mo.App.1990) (officer had reasonable suspicion to justify investigatory stop where passenger ducked out of sight in an apparent effort to hide something under the seat when officer turned on his "take-down"

lights). Thus, under *Terry,* Officer Wood was justified in conducting the ensuing detention, the order to exit the car, and the pat-down search for weapons. In addition, under *Michigan v. Long,* 463 U.S. at 1051, 103 S.Ct. 3469 Officer Wood's subsequent search of the passenger area of the car and the seizure of the pistol from beneath the passenger seat were permissible as part of a "protective sweep" for weapons. Further, after finding the pistol, Officer Wood had probable cause to arrest Deck for unlawful use of weapons. Considering the totality of the circumstances, Officer Wood's conduct was lawful in all of these respects.

As a secondary point, Deck contends that the detention, search and seizure were unlawful because they were based on an informant's tip without any showing that the source of the information was reliable. Although the informant identified himself as Charles Hill, the record does not reveal whether the police had any gauge of his reliability at the time the tip was made,[1] and accordingly, Deck analogizes the situation to cases involving anonymous tips. While it is correct, in general, that a detention and search and seizure is unlawful if conducted solely on the basis of an anonymous tip, *Alabama v. White,* 496 U.S. at 329, 110 S.Ct. 2412, no case has held that an anonymous tip must be ignored in determining whether "reasonable suspicion" exists. Instead, police may properly consider such evidence if it is in conjunction with, as here, other, independent corroborative evidence suggestive of

[1] Charles Hill testified at the preliminary hearing that he was a retired Marine sergeant and a former boyfriend of Tonia Cummings, who overheard Deck and Cumming's plan for the robbery/murder about a week before it was carried out. Hill did not, however, testify at the suppression hearing or at trial.

criminal activity. *Id.* at 329-332, 110 S.Ct. 2412. In this case, the information from Hill was corroborated by Officer Wood's observation of 1) a two-door, gold car that matched the description of the car Deck was said to be driving and that pulled in the parking lot of the apartment complex where Deck was said to reside; 2) the same car being driven with the lights off late at night as if to avoid detection; and 3) the driver's reaction when he first saw Officer Woods. In essence, the evidence that corroborates the anonymous tip is the same evidence that, when considered with the anonymous tip, constitutes the grounds for reasonable suspicion.

Because the state has met its burden of showing that no Fourth Amendment violation occurred, this Court holds that the trial court correctly overruled the motion to suppress and properly admitted the evidence in question at trial.

IV. Voir Dire

A. Gender-*Batson* Challenges

Deck next claims that the trial court erred in overruling his objections to the state's peremptory strikes of two female venirepersons in violation of *Batson v. Kentucky,* 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), and *J.E.B. v. Alabama ex rel. T.B.,* 511 U.S. 127, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994). In *Batson,* the United States Supreme Court prohibited the use of peremptory strikes to exclude potential jurors based on race, *Batson,* 476 U.S. at 97, 106 S.Ct. 1712, and in *J.E.B., Batson* was extended to prohibit peremptory strikes on the basis of gender. *J.E.B.,* 511 U.S. at 146, 114 S.Ct. 1419.

Missouri has adopted a three-step process for making a successful *Batson* challenge. *State v. Parker,* 836 S.W.2d 930, 939 (Mo. banc 1992). First, the defendant must object to the state's peremptory strike and identify the protected class to which the prospective juror belongs. *Id.* The state is then required to provide a reasonably specific and clear, race and/or gender-neutral explanation for the strike. *Id.* If the state provides such an explanation, the burden then shifts to the defendant to show that the state's explanation was pretextual and that the strike was actually motivated by the prospective juror's race or gender. *Id.*

In evaluating the prosecutor's explanation, the chief consideration is whether the explanation is plausible in light of the totality of the facts and circumstances surrounding the case. *Id.* While the presence of similarly-situated white or male jurors is probative of pretext, it is not dispositive. *Id.* This Court will reverse the trial court's decision on a *Batson* challenge only upon a showing of clear error. *Id.*

The first of the two gender *Batson* challenges involved prospective juror number sixteen, a female, who the prosecutors struck with the following explanation:

> MR. JERRELL: Your Honor, the first time I laid eyes on . . . and heard her speak, I thought she was a very weak juror. In fact, that's what I wrote in my notes during the middle of voir dire. Also her son's been prosecuted . . . and I can't even read my own writing, but I don't want any juror on there, at least her, where her son's been prosecuted.
>
> MR. WILKINS: Actually it's not her son. Her ex-brother-in-law is in the Department of Corrections

for burglary and his son has a current charge pending in our county.

MR. JERRELL: I stand corrected. Exactly what my notes say. That's my reasons for [her].

MR. WILKINS: Likewise, Your Honor, I had independent of Mr. Jerrell also written the word weak on [her] and independent of him, also based upon.

The prosecutors' responses indicate that prospective juror number sixteen was stricken not because of her gender but because she would be a "weak" juror and she had relatives who had been or were being prosecuted. An explanation based on a prospective juror's general demeanor, which in this case gave rise to the perception that she was "weak," is facially non-discriminatory. *State v. Smulls,* 935 S.W.2d 9, 15 (Mo. banc 1996). So too is the fact of the arrest, conviction, or incarceration of a prospective juror's relative. *State v. Payne,* 958 S.W.2d 561, 565 (Mo.App.1997); *State v. Johnson,* 930 S.W.2d 456, 461-62 (Mo.App.1996). These explanations were reasonably specific, clear and gender-neutral and thus satisfied the second prong of the *Batson* analysis.

The second gender-*Batson* challenges involved prospective juror number fifty, a female, who was struck for the following reasons:

MR. JERRELL: As for [her], I didn't think much of her either. She does have what we believe to be a prior DWI in Kirkwood, which she never mentioned, from our research on her. I also felt that she was not a strong juror. So that's why we decided to strike her.

MR. WILKINS: Quite frankly, she has a prior DWI in the City of Kirkwood. That's what the criminal history record shows. She was very red-cheeked, sixtiesh, sixty-eight, single. My concern, my interest was that that might signal an alcohol habit, problem, whatever. Had nothing to do with the fact that she was female.

The prosecutors' responses indicate that prospective juror number fifty was struck from the panel because she had a prior DWI conviction that she did not disclose. As stated, a prior conviction is an appropriate and neutral basis for a peremptory strike. *Payne,* 958 S.W.2d at 565. Deck argues, however, that the strike was pretextual because the prosecutors chose not to strike a similarly situated male who stated during voir dire that he was arrested and pled guilty to driving while intoxicated. To the contrary, the male prospective juror was not similarly situated to her because he admitted his DWI conviction when the prosecutor asked about prior arrests and convictions during voir dire while she did not. Deck further contends that the prosecutors could not properly base the peremptory strike on her DWI because no information regarding the offense was brought out during voir dire. Deck fails to recognize, however, that lawyers are not prohibited from using information outside the record as a basis for a peremptory strike. *See State v. Whitfield,* 837 S.W.2d 503, 509 (Mo. banc 1992) (arrest records may be accessed for use in selecting jury).

In sum, Deck has not shown that the prosecutors' reasons for striking these two potential jurors were merely pretextual and that the strikes were motivated by gender. The point is denied.

B. Challenge for Cause

Deck also contends that the trial court erred in overruling his motion to strike prospective juror Scott Arnold who gave some indication during voir dire that he might automatically impose the death penalty. According to Deck, this error violated his rights to due process of law, to a fair and impartial jury, to reliable sentencing, and to be free from cruel and unusual punishment as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and article I, sections 10, 18 and 21 of the Missouri Constitution. However, because Deck used a peremptory strike to remove Mr. Arnold from the panel and Mr. Arnold did not serve as a member of the jury, the claim is precluded by section 494.480.4, RSMo 1994, which states:

> The qualifications of a juror on the panel from which peremptory challenges by the defense are made shall not constitute a ground for the granting of a motion for new trial or the reversal of a conviction or sentence unless such juror served upon the jury at the defendant's trial and participated in the verdict rendered against the defendant.

The point is denied.

V. Penalty Phase – Victim Impact Testimony

Deck asserts that the testimony of William Long, the son of the victims, exceeded the guidelines for victim impact evidence established by the United States Supreme Court in *Payne v. Tennessee,* 501 U.S. 808, 825, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991), and that the trial court erred in overruling his motion for a mistrial because of the

resulting emotional reaction in the courtroom. The matter arose as part of the state's penalty phase testimony when William Long read a statement that the family had prepared. After his testimony, three members of the jury were crying, as were members of the Long family who were seated in the courtroom.

Victim impact evidence is admissible under the United States and Missouri Constitutions. *State v. Roberts,* 948 S.W.2d 577, 594 (Mo. banc 1997), *cert. denied.* 522 U.S. 1056, 118 S.Ct. 711, 139 L.Ed.2d 652 (1998). According to *Payne,* just as the defendant is entitled to present evidence in mitigation designed to show that the defendant is a "uniquely individual human being," the State is also allowed to present evidence showing each victim's "uniqueness as an individual human being." *Payne,* 501 U.S. at 822-23, 111 S.Ct. 2597. In particular, "the State is permitted to show that victims are individuals whose deaths represent a unique loss to society and to their family and that the victims are not simply 'faceless strangers.'" *Id.* at 825, 111 S.Ct. 2597. *Payne* also holds that victim impact evidence violates the constitution only if it is so "unduly prejudicial that it renders the trial fundamentally unfair." *Id.* Deck argues that the evidence in this case violated this standard and that the jury based its verdict on emotion. He does not, however, complain of the testimony itself, but of the emotional level in the courtroom and the effect it had on the jury.

Although emotional outbursts are to be prevented insofar as possible, the trial court exercises broad discretion in determining the effect of such outbursts on the jury. *State v. Brooks,* 960 S.W.2d 479, 491 (Mo. banc 1997), *cert. denied,* 524 U.S. 957, 118 S.Ct. 2379, 141 L.Ed.2d 746 (1998). Additionally, this Court has held that "[i]n determining

whether to declare a mistrial, the trial court may consider the spontaneity of the outburst, whether the prosecution was at fault, whether something similar, or even worse, could occur on retrial, and the further conduct of the trial." *Id.*

Deck does not point to specific instances in the record that indicate an "extreme emotional level," and therefore, it is difficult to do otherwise than defer to the trial court's discretion. A review of the record does not reflect the "extreme emotional level" Deck describes. There were apparently no emotional outbursts among the family members, only some muted crying during the testimony of the Long children. Furthermore, there is no reason to believe that the family members would not have the same reaction on retrial. In the absence of evidence that emotional outbursts actually occurred, the trial court did not abuse its discretion in overruling Deck's motion for a mistrial.

VI. Penalty Phase – Mitigating Instructions

A. Non-MAI Instructions

Deck next contends that his state and federal constitutional rights were denied when the trial court erroneously refused to submit two non-MAI mitigating circumstance instructions in the penalty phase. Deck's proposed instructions, loosely based on MAI-CR3d 313.44(a), listed six nonstatutory mitigating circumstances for the jury's consideration. This Court again rejects this often-raised claim that the listing of nonstatutory factors in mitigation is constitutionally required. *State v. Clay,* 975 S.W.2d 121, 133 (Mo. banc 1998) *cert. denied,* 525 U.S. 1085, 119 S.Ct. 834, 142 L.Ed.2d 690 (1999); *Rousan,* 961 S.W.2d at 849.

B. Defective Submission of MAI-CR3d 313.44A

Deck raises the far more problematic claim that the defective submission of Instructions No. 8 and No. 13, the penalty phase instructions on the submission of mitigating circumstances, constituted plain error and violated his right to due process of law, to reliable sentencing, and to be free from cruel and unusual punishment as guaranteed by the Fifth, Eighth and Fourteenth Amendments to the United States Constitution and article I, sections 10 and 21, of the Missouri Constitution. The defect was that the final two paragraphs of MAI-CR3d 313.44A, the pattern mitigating circumstances instruction, were inadvertently omitted from Instructions No. 8 and No. 13. That omission, as Deck maintains, created a reasonable likelihood that the jurors mistakenly believed they had to find the existence of any specific mitigating circumstance *by unanimous vote*.

Instruction No. 8, as submitted to the jury, stated:

INSTRUCTION NO. 8

As to Count I, if you unanimously find that the facts and circumstances in aggravation of punishment, taken as a whole, warrant the imposition of a sentence of death upon the defendant, you must then determine whether there are facts or circumstances in mitigation of punishment which are sufficient to outweigh the facts and circumstances in aggravation of punishment. In deciding this question, you may consider all of the evidence presented in both the guilt and the punishment stages of the trial.

Instruction No. 13 was identical, except that it referred to Count III.

The final two paragraphs of MAI-CR 3d 313.44A, which were omitted from the instructions in this case, read as follows:

> You shall also consider any (other) facts or circumstances which you find from the evidence in mitigation of punishment.
>
> It is not necessary that all jurors agree upon particular facts and circumstances in mitigation of punishment. If each juror determines that there are facts or circumstances in mitigation of punishment sufficient to outweigh the evidence in aggravation of punishment, then you must return a verdict fixing defendant's punishment at imprisonment for life by the Department of Corrections without eligibility for probation or parole.

Because Deck failed to object to these instructions at trial, this Court is asked to review for plain error. For instructional error to rise to the level of plain error, the trial court must have so misdirected or failed to instruct the jury so that it is apparent that the instructional error affected the verdict. *State v. Doolittle,* 896 S.W.2d 27, 29 (Mo. banc 1995).

In a capital case, the sentencer may not be precluded from considering, as a mitigating factor, any relevant circumstance that the defendant proffers as a basis for a sentence less than death. *Mills v. Maryland,* 486 U.S. 367, 374, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988). This principle is violated if the jury is given an instruction that could

reasonably be interpreted as precluding them from considering any mitigating evidence unless the jurors unanimously agree on the existence of such evidence. *Id.* at 384, 108 S.Ct. 1860. On the other hand, there is no constitutional requirement that the jury in a capital case be given any particular guidance as to how to undertake the discretionary sentencing decision. *Buchanan v. Angelone,* 522 U.S. 269, 118 S.Ct. 757, 761-62, 139 L.Ed.2d 702 (1998).

The fallacy of Deck's argument – that the jury was likely misled into believing that they had to find mitigating circumstances by unanimous vote – is that it wrongly assumes that the omitted paragraph was necessary to comply with the holding in *Mills*. *See State v. Petary,* 790 S.W.2d 243 (Mo. banc 1990). Before MAI-CR 3d 313.44 was revised, effective January 1, 1989, the omitted paragraph was not part of the pattern instruction, and in its place, was a paragraph that read as follows:

> If you unanimously find that one or more mitigating circumstances exist sufficient to outweigh the aggravating circumstances found by you to exist, (then) (then, on Count ___) you must return a verdict fixing defendant's punishment at imprisonment for life by the Division of Corrections without eligibility for probation or parole.

Like Instructions No. 8 and No. 13 in this case, the old version of the pattern instruction did not specifically advise the jurors that they need not unanimously find the existence of a particular mitigating facts or circumstances. Nonetheless, the old version, despite the alleged defect, survived essentially the same constitutional challenge under *Mills* that is now brought in this case. *State v. Weaver,* 912 S.W.2d 499, 518 (Mo. banc 1995); *Petary,* 790 S.W.2d at 245. Although the alleged defect in this case was

the omission of the final paragraph of the instruction, rather than the inclusion of an allegedly defective paragraph in the old version of the instruction, the alleged defect is essentially the same – that both instructions purported to require unanimous votes on mitigating circumstances.

The rationale of this Court's holding in *Weaver* and *Petary* is that when the instructions in question are considered in conjunction with all the other instructions, the jury is not misled. *Id*. Here, as in *Weaver* and *Petary*, additional explanatory instructions were submitted for both counts. Those instructions, No. 9 and No. 14, were based on MAI-CR 3d 313.46A and were identical except for reference to different counts. Instruction No. 9 stated:

> As to Count I, you are not compelled to fix death as the punishment even if you do not find the existence of facts and circumstances in mitigation of punishment sufficient to outweigh the facts and circumstances in aggravation of punishment. You must consider all the evidence in deciding whether to assess and declare the punishment at death. Whether that is to be your final decision rests with you.

This Court observed in *Petary* that MAI-CR 3d 313.46A informs the jury,

> in unmistakable terms that it is never obliged to return death sentence. It has already been told that, in making this decision, it may consider any circumstances it finds in mitigation of punishment. It is clear that in making this final resolution each juror may consider any fact or circum stance which he or she considers sufficient to indicate mitigation, or, for that matter, a juror may vote against a death sentence without having a reason.

Petary, 790 S.W.2d at 246.

Because Instructions No. 9 and No. 14 were submitted along with Instructions No. 8 and No. 13, it was made clear to each juror that he or she was individually afforded the discretion to find mitigating circumstances, without unanimity with the other jurors, and vote against a death sentence on the basis of those individual findings alone. Furthermore, the possibility that the jurors were misled should be discounted even more by the fact that defense counsel argued forcefully in his closing that each juror had the individual right to vote for a sentence of life.

Despite Deck's assertions, Instructions No. 8 and No. 13 explicitly require unanimity only in finding facts and circumstances in *aggravation* of punishment. There is no basis for reading that requirement into the rest of the instruction. In fact, it is all the more unlikely that the jurors perceived a unanimity requirement in this case, because there were no statutory mitigators submitted for their consideration. The instructions, as given and taken as a whole, effectively guided the jurors through the deliberation process as set out in sections 565.030 and 565.032, RSMo 1994, and there is no reasonable likelihood that the jury applied the challenged instructions in a way that prevented the consideration of mitigating circumstances.

In a related argument, Deck contends that the jury was not instructed that they must return a verdict fixing punishment at imprisonment for life if the evidence in mitigation of punishment was sufficient to outweigh the evidence of aggravation of punishment, as required by

section 565.030.4(3), RSMo 1994. We disagree. While it is true that Instructions No. 8 and No. 13 did not explicitly mandate the punishment at life imprisonment if the circumstances in mitigation outweighed the circumstances in aggravation, it was nonetheless clear from the other instructions that that result must follow because life imprisonment was the only sentencing alternative available. The point is denied.

C. Failure to Define "Mitigating"

The next issue involves an unusual incident that occurred during the jury's deliberations. The jury sent a note to the trial court asking, "What is the legal definition of mitigating (as in mitigation circumstances)? Instruction 8." The trial court replied, "Any legal terms in the instructions that have a 'legal' meaning would have been defined for you. Therefore, any terms that you have not had defined for you should be given their ordinary meaning." The jury followed up with a note inquiring "Can we have a dictionary?" The trial court informed the jury, "No, I'm not permitted to give you one." Deck contends that this apparent confusion on a legal issue obligated the trial court to provide the requested definition and that the failure to do so compounded the error concerning the omitted paragraphs from Instructions No. 8 and No. 13. Significantly, Deck did not raise this issue at trial. When the jury posed the questions, Deck did not request that the term "mitigating" be defined, nor did he object to the trial court's responses. In the absence of an objection, Deck asks for plain error review under the manifest injustice standard of Rule 30.20.

Despite the fact that one or more jurors may have been confused, the trial court gave the correct responses to the questions. The first question was a request for the "legal definition" of "mitigating," but this word is not defined in the MAI-CR 3d instructions. *See* MAI-CR 3d 313.44A (10-1-94); MAI-CR 3d 333.00 (1-1-87). This Court has held that "[w]hen MAI notes on use do not provide for a definition, the court must not give one." *State v. Feltrop,* 803 S.W.2d 1, 14 (Mo. banc 1991). In *State v. Wise,* 879 S.W.2d 494, 518 (Mo. banc 1994), a case particularly on point, the defendant claimed the trial court erred in refusing the defendant's tender of an instruction defining the term "mitigation." In upholding the trial court's ruling, this Court stated, "MAI instructions do not define 'mitigation'; therefore, the court properly refused the proposed definition." *Id.* Consistent with *Feltrop* and *Wise*, the notes on use to the MAI-CR 3d instruction on definitions provides:

> A definition of a term, word, or group of words shall not be given unless permitted by paragraphs A, B, C, D, or E above, [not applicable in this case] even if requested by counsel or the jury. If the jury, while deliberating, requests the definition of a term whose definition is not permitted by paragraphs A, B, C, D, or E above, the following response is suggested:
>
> I am not permitted to define the word(s) ____ for you. (Except for those terms for which you have been supplied definitions, each) (Each) word used in the instruction has its common and generally understood meaning.

MAI-CR 3d 333.00 (1-1-87), Note on Use 2. As noted, the trial court followed this instruction to the letter. No error was committed.

Additionally, the trial court was correct in refusing to provide a dictionary for the jury. All courts view the use of a dictionary as highly improper because the jury should rely solely upon the evidence and the court's instructions. *State v. Suschank,* 595 S.W.2d 295, 297-98 (Mo.App.1979). The impropriety of permitting jurors to search a dictionary is that it allows them to select at will definitive language that might misrepresent the court's instructions. *State v. Taylor,* 581 S.W.2d 127, 129 (Mo.App.1979). In view of these cases, Deck's position that the judge may supplement an instruction with a dictionary definition is not persuasive.

The essence of Deck's argument is that the penalty phase instructions, and the mitigating circumstances instructions in particular, are too easily misunderstood. At the hearing on the motion for new trial, Deck called Dr. Richard Weiner, a psychologist, who testified that "Missouri penalty phase instructions are poorly understood." Dr. Weiner explained that he came to that conclusion as a result of a study he conducted that also showed that jurors have the most difficulty with the concept of mitigation. Dr. Weiner's study, however, must be discounted because the people interviewed for the study did not act as jurors. They were given hypothetical facts that were different than the facts in this case, and they did not hear the testimony of witnesses, observe physical evidence or deliberate with eleven other jurors. More importantly, in the context of the instructions as a whole, the term "mitigating" is always contrasted with the term "aggravating" so that no reasonable person could fail to understand that "mitigating" is the opposite of "aggravating." That contrast, for instance, is highlighted in Instructions No. 9 and No. 14, which were based on MAI-CR 3d 313.465A and

which stated in pertinent part, "you are not compelled to fix death as the punishment even if you do not find the existence of facts and circumstances in mitigation of punishment sufficient to outweigh the facts and circumstances in aggravation of punishment. . . ."

Finally, Deck's suggestion that the jury's confusion about the word "mitigating" was due in large part to the omission of the concluding paragraphs to Instructions No. 8 and No. 13 likewise has no merit. Those omitted paragraphs do not even purport to define mitigation for the jury. Moreover, Deck's notion that the jury questions reveal that some jurors "thought they were prohibited from considering certain facts or circumstances as 'mitigating'" and therefore in violation of *Mills v. Maryland,* rests on pure speculation and does not logically follow from the content of the questions.

For these reasons, this Court concludes that the trial court committed no error in refusing to define the term "mitigating" or to provide the jury with a dictionary.

VII. Penalty Phase – Closing Argument

Deck next alleges that the trial court erred in permitting the prosecutor to make improper comments during penalty phase closing argument. The trial court has broad discretion in controlling the scope of closing argument and the court's rulings will be cause for reversal only upon a showing of abuse of discretion resulting in prejudice to the defendant. *State v. Rousan,* 961 S.W.2d 831, 851 (Mo. banc), *cert. denied,* 524 U.S. 961, 118 S.Ct. 2387, 141 L.Ed.2d 753 (1998). In order for a prosecutor's statements to have such a decisive effect, there must be a reasonable probability that the verdict would have been different had

the error not been committed. *State v. Barton,* 936 S.W.2d 781, 786 (Mo. banc 1996).

A. Mercy Argument

The first particularized claim is that the prosecutor stated that the jury should impose the death penalty because that was "the only sentence [the jury could] impose to show justice and to show mercy to those people, to the people in the courtroom." Defense counsel objected to the statement and requested a mistrial. The trial court sustained the objection, but overruled the motion for a mistrial. The trial court then granted the prosecutor permission to rephrase the comment, but did not advise the jury that the objection had been sustained. Deck argues that the trial court's inaction violated his rights to due process of law, a fair trial, reliable sentencing, and to be free from cruel and unusual punishment as guaranteed by the Fifth, Eighth and Fourteenth Amendments to the United States Constitution and article I, sections 10, 18(a) and 21 of the Missouri Constitution.

Deck's argument focuses on the fact that the trial judge did not advise the jury that the objection had been sustained. However, Deck never requested that the trial court advise the jury that the objection was sustained, and, instead, the trial court took sufficient curative action on its own initiative and properly instructed the prosecuting attorney to rephrase his argument.

The need for curative action assumes, of course, that the prosecutor's mercy argument was improper in the first place. Prosecutors may discuss the concept of mercy in their closing arguments because mercy is a valid sentencing consideration, *Rousan,* 961 S.W.2d at 851, and in that

connection may argue that the defendant should not be granted mercy. Prosecutors cannot, however, argue that the jurors may not lawfully grant a defendant mercy by imposing a life sentence. *Id.* In this case, the prosecutor did not argue that the jurors could not lawfully grant mercy on appellant; thus, Deck's argument has no merit.

B. Personalization

Deck also claims that the trial court erred in permitting the prosecutor to personalize his penalty phase closing argument. The prosecutor told the jury that while they were deliberating, they should "count out ten minutes and you think about how long that is and then think about somebody pointing a gun at your head at the same time." No objection was made to the prosecutor's argument; therefore, Deck requests plain error review.

Relief should rarely be granted on an assertion of plain error in closing argument. *State v. Silvey,* 894 S.W.2d 662, 670 (Mo. banc 1995). The reason, as this Court has explained, is that "in the absence of objection and request for relief the trial court's options are narrowed to uninvited interference with [the closing argument] and a corresponding increase of error by such intervention." *Id.* In order to be entitled to relief, appellant must make a substantial showing that manifest injustice will result if relief is not granted. *State v. Wood,* 719 S.W.2d 756, 759 (Mo. banc 1986).

Deck argues that the prosecutor's comment urging the jurors to put themselves in the place of the victim was the same kind of improper personalization this Court condemned in *State v. Storey,* 901 S.W.2d 886, 901 (Mo. banc 1995). In *Storey,* the prosecutor told the jurors to put

themselves in the victim's place and then graphically described the crime to the jurors as if they were the victims. This Court concluded that the prosecutor's argument was improper because it "could only arouse fear in the jury," *id.*, and moreover, arguments that inflame and arouse fear in the jury are especially prejudicial when the death penalty is at issue. *Id.* (citing *State v. Tiedt,* 357 Mo. 115, 206 S.W.2d 524, 529 (Mo. banc 1947)).

The prosecutor's argument in this case is distinguishable from the prosecutor's argument in *Storey*. Here, the prosecutor's comments were brief and isolated and did not involve graphic detail, and as such, they did not result in manifest injustice. The point is denied.

VIII. Reasonable Doubt Instruction

Deck claims that the trial court erroneously submitted instructions in both guilt phase and penalty phase by defining "proof beyond a reasonable doubt" with the words, "firmly convinced." Citing *Cage v. Louisiana,* 498 U.S. 39, 111 S.Ct. 328, 112 L.Ed.2d 339 (1990), Deck contends that this language allowed the jury to reach its decisions on both guilt and punishment based upon a level of proof less than that which is constitutionally mandated. This Court has consistently and repeatedly denied Deck's precise claim. The phrase "firmly convinced" is essentially synonymous with the phrase "beyond a reasonable doubt." *State v. Barnett,* 980 S.W.2d 297 (Mo. banc 1998), *cert. denied,* 525 U.S. 1161, 119 S.Ct. 1074, 143 L.Ed.2d 77 (1999); *State v. Jones,* 979 S.W.2d 171 (Mo. banc 1998), *cert. denied,* 525 U.S. 1112, 119 S.Ct. 886, 142 L.Ed.2d 785 (1999); *State v. Johnson,* 968 S.W.2d 686 (Mo. banc 1998). The point is denied.

IX. Independent Review under Section 565.035.3

Under section 565.035.3, RSMo 1994, this Court is required to determine:

> 1) Whether the sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor;
>
> 2) Whether a statutory aggravating circumstance and any other circumstances found by the trier of fact were supported by the evidence; and
>
> 3) Whether the sentence is excessive or disproportionate to the punishment imposed in similar cases, considering both the crime, the strength of the evidence and the defendant.

Having thoroughly reviewed the record, this Court is satisfied that there is no evidence to suggest that the punishment imposed was a product of passion, prejudice, or any other arbitrary factor.

With regard to statutory aggravating circumstances, the jury found: 1) that each murder was committed while the defendant was engaged in the commission of another unlawful homicide, section 565.032.2(2); 2) that the murders were committed for the purpose of receiving money or any other thing of monetary value, section 565.032.2(4); 3) that the murders were outrageously and wantonly vile, horrible, and inhuman in that they involved depravity of mind, section 565.032.2(7); 4) that the murders were committed for the purpose of avoiding a lawful arrest, section 565.032.2(10); 5) that the murders were committed while defendant was engaged in the perpetration of burglary, section 565.032.2(11); and 6) that the murders were committed while defendant was engaged in the perpetration of robbery, section 565.032.2(11). From

this Court's review of the record, the evidence amply supports the statutory aggravators found by the jury.

Finally, the imposition of the death penalty in this case is clearly not excessive or disproportionate. The strength of the evidence and the circumstances of the crime far outweigh any mitigating factors in Deck's favor.

There are numerous Missouri cases where, as here, the death penalty was imposed on defendants who murdered more than one person. *See, e.g., State v. Johnson,* 968 S.W.2d 123 (Mo. banc 1998); *State v. Clemons,* 946 S.W.2d 206 (Mo. banc 1997); *State v. Ramsey,* 864 S.W.2d 320 (Mo. banc 1993); *State v. Mease,* 842 S.W.2d 98 (Mo. banc 1992); *State v. Hunter,* 840 S.W.2d 850 (Mo. banc 1992); *State v. Ervin,* 835 S.W.2d 905 (Mo. banc 1992); *State v. Powell,* 798 S.W.2d 709 (Mo. banc 1990); *State v. Reese,* 795 S.W.2d 69 (Mo. banc 1990); *State v. Sloan,* 756 S.W.2d 503 (Mo. banc 1988); *State v. Griffin,* 756 S.W.2d 475 (Mo. banc 1988); *State v. Murray,* 744 S.W.2d 762 (Mo. banc 1988); *State v. Young,* 701 S.W.2d 429 (Mo. banc 1985).

In addition, a sentence of death has often been imposed when the murder involved acts of brutality and abuse that showed depravity of mind. *See, e.g., State v. Kinder,* 942 S.W.2d 313 (Mo. banc 1996); *State v. McMillin,* 783 S.W.2d 82 (Mo. banc 1990); *State v. Sidebottom,* 753 S.W.2d 915 (Mo. banc 1988); *State v. Walls,* 744 S.W.2d 791 (Mo. banc 1988); *State v. Lingar,* 726 S.W.2d 728 (Mo. banc 1987); *State v. Roberts,* 709 S.W.2d 857 (Mo. banc 1986).

This Court has also upheld the death sentence where the murder was committed in hopes of avoiding arrest or detection. *State v. Clemons,* 946 S.W.2d 206 (Mo. banc 1997); *State v. Copeland,* 928 S.W.2d 828 (Mo. banc 1996);

State v. Richardson, 923 S.W.2d 301 (Mo. banc 1996); *State v. Gray,* 887 S.W.2d 369 (Mo. banc 1994); *State v. Ramsey,* 864 S.W.2d 320 (Mo. banc 1993); *State v. Six,* 805 S.W.2d 159 (Mo. banc 1991); *State v. Kilgore,* 771 S.W.2d 57 (Mo. banc 1989); *State v. Griffin,* 756 S.W.2d 475 (Mo. banc 1988); *State v. Grubbs,* 724 S.W.2d 494 (Mo. banc 1987); *State v. Foster,* 700 S.W.2d 440 (Mo. banc 1985).

The death penalty imposed in this case is proportionate to the sentence imposed in similar cases.

X.

For the foregoing reasons, the judgment is affirmed.

All concur.

Office of Circuit Clerk

HOWARD WAGNER

State of Missouri Div. No. 2

VS

Carmen Deck

Docket No.

Case No. CR196-1084-FX-J2

In the CIRCUIT COURT JEFFERSON COUNTY, MISSOURI

4/9 20 03

MEMORANDUM

6 or 12 JURORS
WITNESS OATH

COURT REPORTER
APPT. AD. LITEM ATTY.

The Jefferson county jail is hereby ordered to allow the defendant Carmen Deck to dress in court clothes for trial starting on 4/29/03.

SO ORDERED:

/s/ Gary P. Kramer

4-9-03

Copies to atty

SO ORDERED:

/s/ [Illegible]
PLF. ATTORNEY

/s/ David Bruns
DEF. ATTORNEY

IN THE CIRCUIT COURT OF JEFFERSON COUNTY
STATE OF MISSOURI

STATE OF MISSOURI, Plaintiff	)	Cause No. CR196-1084FXJ2
	)	Division No. 2
v.	)	
CARMAN DECK, Defendant	)	

MOTION TO HAVE ACCUSED APPEAR AT TRIAL FREE OF RESTRAINTS

COMES NOW Carman Deck, by and through counsel, and requests the Court to allow Mr. Deck to appear at trial free from shackles and restraints. In support thereof, Mr. Deck alleges:

1. Mr. Deck has not disrupted any court proceeding throughout the pendency of this case.

2. To require Mr. Deck to appear in restraints of any kind would violate Mr. Deck's right to be presumed innocent, his right to remain silent, right to equal protection of the laws, right to due process, right to be free of cruel and unusual punishment, and right to trial by a fair and impartial jury, pursuant to Article I, Sections 2, 10, 18(a), 19 and 21 to the Missouri Constitution, and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. *See Estelle v. Williams,* 425 U.S. 501, 96 S.Ct. 1691, 1697 (1976) (The State cannot, consistently with the Fourteenth Amendment, compel an accused to stand trial before a jury while dressed in identifiable prison clothes.)

3. "Of coursed, a defendant is entitled to the physical indicia of innocence, otherwise the legal presumption of innocence may be weakened." *United States v. Jackson,* 549 F.2d 517, 526-27 (8th Cir. 1976). Although it is clear that a trial court has "considerable, but not unlimited, discretion" to compel the use of restraints for the purpose of maintaining order and security in the courtroom, "if the use of security measures is not supported by good cause, a defendant is entitled to appear before the jury unfettered." *See State v. Jimerson*, 820 S.W.2d 500, 503 (Mo. App. 1991); *State v. Endicott*, 881 S.W.2d 661, 663 (Mo. App. 1994); *State v. Guinan*, 665 S.W.2d 325, 331 (Mo. banc 1984); *State v. Gilmore*, 661 S.W.2d 519, 525 (Mo. banc 1983). If the trial judge finds that 'good reason' or 'exceptional circumstances' exist, he may require the physical restraint of the defendant." *State v. Endicott*, 881 S.W.2d at 663. The question then becomes, what constitutes "good cause", "good reason," or "exceptional circumstances," and what other restrictions, if any, are placed upon trial judges before they may exercise their discretion to restrain an accused in the presence of the jury.

4. An analysis of the constitutional right of an accused to appear unfettered before a jury must begin with *Illinois v. Allen,* 397 U.S. 337, 90 S.Ct. 1057 (1970). The context of *Allen* was an assertion that the appellant's Sixth Amendment right to confront the witnesses against him had been violated because he was removed from the courtroom for portions of his trial due to his extraordinarily disruptive and disrespective behavior. *Id.* at 1060. While holding that the accused's right to be present is not absolute and may be lost "after he has been warned by the judge that he will be removed if he continues his disruptive behavior, [if] he . . . insists on conducting himself in a

manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom," the Supreme Court went on to give trial court judges "sufficient discretion to meet the circumstances of each case." *Id.* at 1060-61. The Court set forth three "constitutionally permissible ways for a trial judge to handle an obstreperous defendant. . . ." *Id.* at 1061. Among these three constitutionally permissible choices is binding and gagging the defendant. *Id.* The other options the Court sanctioned were holding the accused in contempt or removing him from the courtroom. *Id.* The Court, however, recognized that even "to contemplate such a technique [binding and gagging], much less see it, arouses a feeling that no person should be tried while shackled and gagged except as a last resort. Not only is it possible that the sight of shackles and gags might have a significant effect on the jury's feelings about the defendant, but the use of this technique is itself something of an affront to the very dignity and decorum of judicial proceedings that the judge is seeking to uphold." *Id.* While holding that, in the case of Mr. Allen, his removal from the courtroom was not unconstitutional, the Court specifically referred to his behavior as "clearly of such an extreme and aggravated nature as to justify either his removal from the courtroom or his total physical restraint." *Id.* at 1062.

5. The United States Supreme Court again referenced the "inherently prejudicial practice" of requiring shackling of a defendant in the presence of the jury in *Holbrook v. Flynn,* 475 U.S. 559, 568, 106 S.Ct. 1340, 1345-46 (1986). In *Holbrook* the trial court had simply "beefed up" the ordinary security in the courtroom by having four uniformed state troopers sitting in the first row of the spectators' section for this trial of six co-defendants on armed bank

robbery charges. There was objection by counsel to the presence of these four uniformed officers. *Id.* at 1343-44. In analyzing the error complained of in *Holbrook,* the Court acknowledged that although the adversary system and the assiduous oversight of a trial judge are supposed to be the insurance of a fair result at trial, "[o]ur faith in the adversary system and in jurors' capacity to adhere to the trial judge's instructions has never been absolute, however. We have recognized that certain practices pose such a threat to the 'fairness of the fact-finding process' that they must be subjected to 'close judicial scrutiny.'" *Id.* at 1345 (Citing *Estelle v. Williams,* 425 U.S. 501, 503-04, 96 S.Ct. 1691, 1692-93, 48 L.Ed.2d 126 (1976) in which the Court noted that "where a defendant is forced to wear prison clothes when appearing before the jury, 'the constant reminder of the accused's condition implicit in such distinctive, identifiable attire may affect a juror's judgment.'") Although the Court in *Holbrook* was dealing with the issue of four uniformed officers in the courtroom, its following comment framing the issue is instructive: "The first issue to be considered here is thus whether the conspicuous, or at least noticeable, deployment of security personnel in a courtroom during trial is the sort of **inherently prejudicial practice that, like shackling, should be permitted only where justified by an essential state interest specific to each trial.**" 106 S.Ct. at 1345-46. (Emphasis added). Going on to discuss the differences between the "inherently prejudicial" practice of shackling and the issue in Mr. Holbrook's case, the Court noted that "[w]hile shackling and prison clothes are unmistakable indications of the need to separate a defendant from the community at large, the presence of guards at a defendant's trial need not be interpreted as a sign that he is particularly dangerous or culpable." *Id.* at

1346. The Court did recognize and discuss the possibility that under certain conditions the sight of a security force in the courtroom could "'create the impression in the minds of the jury that the defendant is dangerous or untrustworthy,'" but did not consider that "any use of identifiable security guards in the courtroom" was "inherently prejudicial," as distinguished from shackling. *Id.* The Court expressed its belief that a case-by-case approach is appropriate on the issue of security guards in the courtroom during trial. *Id.*

6. The 8th Circuit Court of Appeals has addressed this issue of shackling a defendant during trial on more than one occasion, and it is instructive to delineate what that Court has considered "good cause" for this practice. In *Zeitvogel v. Delo,* 84 F.3d 276 (8th Cir. 1996), Mr. Zeitvogel was being tried for a prison murder which occurred in the Missouri State Penitentiary and was shackled during his trial. The issue was before the Court as an allegation of violation of his due process rights which had not been raised in any court below and as an allegation of ineffective assistance of counsel for not objecting to the shackling. *Id.* at 283. The Court found no error in the shackling of Mr. Zeitvogel because at the time of trial he had murder, rape, and assault convictions and had escaped from state custody once before; additionally, the Court noted that the jury would have learned from the trial evidence that Mr. Zeitvogel was an inmate even without seeing the shackles because the trial was the result of charges of a prison murder. *Id.*

7. *United States v. Darden,* 70 F.3d 1507 (8th Cir. 1995) was an appeal from the joint trial of nine co-defendants (two were acquitted) on criminal racketeering enterprise charges that lasted almost nine months in the

Eastern District of Missouri. *Id* at 1516-17. The Court, in rendering its opinion that the trial court had not abused its discretion in implementing certain security measures, referred to these defendants as having been charged with "participating in an extraordinarily violent criminal enterprise with a history of conflict with law enforcement" including "the intimidation and murder of government witnesses." *Id.* at 1533. One of the appellants, Mr. Amerson, raised the issue of the security measures in the courtroom. The five security measures of which Mr. Amerson complained on appeal did not include shackling during trial. *Id.* at 1533. The security measures complained of were: (1) the large numbers of security personnel in the courtroom; (2) the two magnetometers through which entrants to the courtroom had to pass; (3) inspections of the belongings of defense attorneys, initially within view of arriving jurors; (4) the assembling of the jury in a secret location; (5) the transportation of the jurors and defendants to and from the Courthouse in vans operated by the United States Marshal with additional security including armed guards along the street, a convoy of police vehicles, helicopter surveillance, and snipers on the roof of the United States Courthouse in St. Louis. *Id.*

It is noteworthy that in the trial of this case, the defendants were not shackled.

8. In *Gilmore,* 661 S.W.2d 519, 525 (Mo. banc 1983), *cert. denied* 109 S.Ct. 1931, 466 U.S. 945, 80 L.Ed.2d 476, *habeas corpus granted Gilmore v. Armontrout,* 681 F.Supp. 632, *rev'd* 861 F.2d 1061, *cert. denied* 109 S.Ct. 3176, 104 L.Ed.2d 1037, *affirmed* 908 F.2d 385, the defendant was required to sit with leg irons attached during trial. He had previously been convicted of capital murder and had other capital charges pending against him. Holding that the

trial court properly exercised its discretion, the Missouri Supreme Court noted that there was no objection by counsel to this arrangement and that Mr. Gilmore's "legs were under the counsel table concealed from view from the jury and . . . at no time was he moved in the courtroom with restraints for jurors to observe. . . . [a]nd [that] the record [was] destitute of an indication that any juror saw the restraints in place." *Id.* at 525. Clearly, the circumstances cited by the Court, *viz.* the previous capital murder conviction; the other capital murder charges pending; no objection by counsel; the fact that Mr. Gilmore's legs were concealed from the jury; the fact that he was never moved in the courtroom for jurors to see; and the fact that there was no indication in the record that any juror saw the restraints, were important to the Court.

9. In *State v. Sanders,* 903 S.W.2d 234, 236 (Mo. App. E.D. 1995), the defendant was convicted of murder in the first degree. Mr. Sanders' counsel moved for a mistrial after the jury briefly saw Mr. Sanders in handcuffs when he was brought into the courtroom. *Id.* at 238. **"The deputies realized their mistake,** apologized to Defendant's counsel, and apparently uncuffed Defendant immediately." *Id.* (Emphasis added). The Court found no error under these circumstances, specifically noting that the defendant "only briefly appeared before the jury in handcuffs" and noted that it was reasonable for the court to have Mr. Sanders escorted to and from the courtroom in handcuffs. *Id.* at 238-39. This is a very different situation from a defendant being compelled to sit throughout his trial in handcuffs and/or shackles.

10. In *State v. Brooks,* 960 S.W.2d 479, 484 (Mo. banc 1997), Mr. Brooks was tried and convicted of murder in the first degree and related charges and sentenced to

death. He complained on appeal that the trial court erred in denying his motion for mistrial after the bailiffs handcuffed him in front of the jury as the guilty verdicts were being read. *Id.* at 491. At the time of the request for mistrial, the trial judge noted that the incident had occurred in a matter of seconds and that the verdicts had been returned before the handcuffing took place. *Id.* Noting that the declaration of a mistrial is a drastic measure to be employed only in extraordinary circumstances, the Court found no abuse of discretion in denying that motion. *Id.* However, the Court did reiterate the well-established rule that "shackling in the presence of the jury should be avoided if possible. . . . " *Id.* The Court went on to find that in Mr. Brooks' case "the jury saw appellant only after the close of the guilt phase, the jury observed him in shackles only briefly, the jury was dismissed shortly thereafter, and appellant appeared without restraints throughout the remainder of the trial." *Id.*

11. In *State v. Endicott,* 881 S.W.2d 661 (Mo. App. 1994), Mr. Endicott, an inmate at Moberly Correctional Center, was convicted of assault in the second degree and armed criminal action in connection with an assault on two prison guards and another inmate which resulted in one of the guards suffering two puncture wounds in the back and the other inmate suffering three stab wounds, two to the arm and one to the chest resulting in a collapsed lung. *Id.* at 662-63. While ruling that the trial court did not abuse its discretion in ordering Mr. Endicott restrained during his trial, the Court also noted the following regarding that restraint: (1) "[t]he trial court was extremely careful to assure that the jury did not observe Endicott in shackles." (2) "Only his legs were restrained and in doing so the court directed that 'short restraints' be

used so that they would not rattle and that the restraints be placed on him so that they would ordinarily not be visible." (3) "The court also provided that boxes be placed around the table where defendant would sit so that the jury would not observe his restraints." (4) "Furthermore, boxes were to be placed in a similar fashion around the prosecutor's table so as not to call attention to the defendant." (5) "The court advised the parties that if Endicott chose to testify, he would be allowed to enter and exit the witness stand outside the presence of. the jury so that his restraints would not be noticed." *Id.* at 663. The Court concluded that the jury was not in a position to observe the restraints and Mr. Endicott was, therefore, not prejudiced. *Id.*

12. What is abundantly clear from a perusal of cases on both the state and federal level is the following:

(a) The trial court has often taken great pains to insure that the jury does not see the restraints or other security measures; *See United States v. Jackson,* 549 F.2d 517, 527 (8th Cir. 1977) ("[I]t is clear that the jury was carefully shielded from contact with or awareness of the security measures in effect during the course of the trial." No restraints were used); *See State v. Amrine*, 741 S.W.2d 665 (Mo. banc 1987) (Although defendant shackled to his chair, his hands remained free. "It is evident that every effort was made to minimize the chance that the jury would notice the shackles, including declaring a recess so that the jury was not present when defendant was placed on the witness stand." "The judge also stated in the pretrial conference that he did not 'want [defendant] paraded in front of the jury in handcuffs"); *See State v. Endicott,* 881 S.W.2d 661 (Mo. App. 1994) (Defendant's legs restrained. His arms and hands free. Judge ordered

that "short restraints" be used so they would not rattle and that they be placed on him so they would ordinarily not be visible. Moreover, the court also provided that boxes be placed around the table where defendant would sit so that the jury would not observe his restraints. Furthermore, boxes were to be placed in a similar fashion around the prosecutor's table so as not to call attention to the defendant. The court advised the parties that if Endicott chose to testify, he would be allowed to enter and exit the witness stand outside the presence of the jury so that his restraints would not be noticed); *See State v. Gilmore,* 661 S.W.2d 519 (Mo. banc 1983) (Defendant in leg irons only and his legs were under counsel table concealed from view from the jury and at no time was he moved in the courtroom with restraints for jurors to observe).

(b) If the restraints have been seen by a juror or jurors, the glimpse has been brief; *See State v. Jimerson,* 820 S.W.2d 500, 503 (Mo. App. 1991) (Only minimal exposure of shackles to jury due to location of defendant and the table and fact that deputies did not parade him before jury in shackles); *See State v. Brooks,* 960 S.W.2d 479 (Mo. banc 1997) (Defendant convicted of first degree murder, armed criminal action, kidnapping, and attempted forcible rape and sentenced to death. After the guilty verdicts were read, the bailiffs handcuffed Mr. Brooks in the presence of the jury. Court finds that the jury saw him in handcuffs only briefly and that he appeared without restraints throughout the remainder of the trial (penalty phase).

(c) If enhanced security or restraint have been used at trial, it is because the defendant has a history of violent convictions or escape attempts or has exhibited violent or disruptive behavior in the

courtroom or in judge's chambers; *See United States v. Gambina,* 564 F.2d 22, 24 (8th Cir. 1977) (Defendant had a prior conviction for attempted escape; he was involved in another attempted escape; he indicated his intent to escape prior to trial. No restraints were used); *See State v. Johnson,* 850 S.W.2d 401, 402 (Mo. App. W.D. 1993) (Prosecutor requests restraints citing defendant's "fairly violent criminal history, i.e., conviction for first degree assault and armed criminal action; also citing that the defendant was a professional boxer and was on trial for offering violence to a correctional officer. Defense counsel only requested that Mr. Johnson's right hand remain free, which was done); *See State v. Jimerson,* 820 S.W.2d 500, 503 (Mo. App. 1991) (Defendant on trial for offering violence to a correctional officer had previously attempted escape from county jail and had a past history of violence); *See Bibbs v. Wyriek,* 526 F.2d 226, 228 (8th Cir. 1975) (Defendant had reputation for violence and his own counsel requested that two of the strongest bailiffs be assigned to the trial. Morning of trial defendant sent note to judge asking that his counsel be removed; refused to leave his cell to go to courtroom; was forcibly brought to courtroom by sheriff; motion to remove counsel was denied at which time Bibbs rose to his feet announcing in a loud voice that he was not going to trial with his present attorney, then started moving toward the bench and a courtroom exit nearby at which point he was handcuffed. Mr. Bibbs remained in handcuffs until the second day of his trial when, at the first request of his counsel, they were removed); *See State v. Kinder,* 942 S.W.2d 313 (Mo. banc 1996) (Defendant required to wear leg shackles during a portion of the guilt phase of his capital murder trial at request of deputies and bailiffs who complained of some remarks allegedly made my [sic] Mr.Kinder but were

removed after Mr. Kinder's counsel objected); *See Bolder v. Armontrout,* 713 F.Supp 1558 (W.D. Mo. 1989) (Defendant upset with trial judge's denial of his request for continuance on the morning of trial overturned a library table in the pretrial conference and scuffled with guards for approximately five minutes, knocked over his chair in the court room and had to be subdued by guards, resisted being put in his chair by guards, and continually asserted that he would not remain in the courtroom. Moreover, defendant had already been convicted of one murder and was on trial for another); *See State v. Olney,* 954 S.W.2d 698 (Mo. App. 1997) (Defendant handcuffed and in leg and body restraints. Court notes that he was charged with a violent assault on his girlfriend, that he held several people hostage until the police arrived, and that he had an extensive criminal record showing him to be a violent individual including convictions for sodomy, kidnapping, assault and murder); *See Zeitvogel v. Delo,* 84 F.3d 276 (8th Cir. 1996) (Defendant shackled. At time of trial for first degree murder, for which he was convicted and sentenced to death, defendant had murder, rape, and assault convictions and had escaped from state custody once before); *See State v. Gilmore*, 661 S.W.2d 519 (Mo. banc 1983) (Defendant had a previous capital murder conviction and other capital murder charges pending).

(d) A defendant is virtually never completely restrained; his hands, or at least one hand, most often, are free; *See State v. Johnson,* 850 S.W.2d 401 (Mo. App. W.D. 1993) (Defendant on trial for offering violence to a correctional officer. Restraints requested by the prosecutor but defendant allowed to have one hand unshackled); *See State v. Jimerson,* 820 S.W.2d 500, 503 (Mo. App. 1991) (Defendant on trial for offering violence to

a correctional officer. One hand remained unshackled although he had to sit chained in a chair and fastened to the floor. No objection by defense counsel. Deputies did not parade defendant before jury in shackles and defendant kept his shackled hand underneath the table in presence of jury); *See State v. Kinder,* 942 S.W.2d 313 (Mo. banc 1996) (Defendant required to wear leg shackles during a portion of the guilt phase of his capital murder trial at request of deputies and bailiffs who complained of some remarks allegedly made my [sic] Mr.Kinder); *See State v. Amrine,* 741 S.W.2d 665 (Mo. banc 1987) (Defendant convicted of first degree murder for killing a fellow inmate in the state penitentiary and sentenced to death. Defendant's legs shackled to his chair during trial but his hands remained free); *See State v. Endicott,* 881 S.W.2d 661 (Mo. App. 1994) (Defendant's legs restrained. His arms and hands free); *See State v. Gilmore,* 661 S.W.2d 519 (Mo. banc 1983) (Defendant restrained with leg irons only).

(e) Security measures short of the use of restraints are employed; *See United States v. Jackson,* 549 F.2d 517 (8th Cir. 1977) (In the trial of five defendants, three of whom were in custody, security measures used included the presence of five plain clothes United States Marshals in the courtroom, the posting of several Marshals outside the front doors of the courtroom and the use of an electronic metal detecting device on all spectators entering the courtroom); *See United States v. Gambina,* 564 F.2d 22, 24 (8th Cir. 1977) (Defendant, on trial for attempted escape, using a firearm in that attempt and assaulting a United States Marshal with a dangerous weapon. The defendant was representing himself and would, therefore, be moving about the courtroom. Defendant was expected to call several prisoners as witnesses.

The security measures adopted included stationing a large number of nonuniformed deputy marshals at various places inside and outside of the courtroom and limiting the movement of Gambina in the courtroom).

(f) There were numerous defendants. *See United States v. Jackson*, 549 F.2d 517 (8th Cir. 1977) (Five defendants, three of whom were in custody, being tried on charges of conspiracy to distribute heroin and cocaine and conspiracy to possess heroin and cocaine with intent to distribute); *See United States v. Darden,* 70 F.3d 1507 (8th Cir. 1995) (Nine defendants tried on RICO charges involving a history of long-term, violent drug-trafficking enterprise. Although many security measures were taken, no restraints were used).

(g) The restraints are removed or modified at the first request of defendant's counsel. *See Bibbs v. Wyrick,* 526 F.2d 226, 228 (8th Cir. 1975) (Defendant convicted for assault with intent to kill with malice aforethought, habeas corpus denial appealed. Defendant handcuffed at beginning of trial but handcuffs removed at the first objection of defense counsel on the second day of trial).

(h) There is simply an inadequate record for the Court to find that the trial judge abused his discretion in restraining the defendant. *See State v. Gibbs,* 875 S.W.2d 159 (Mo. App. 1994) (Defendant on trial for second degree murder, second degree robbery and armed criminal action. Record shows only that defendant was shackled and that his counsel objected. No record of reasons for the shackling); *See State v. Olney,* 954 S.W.2d 698 (Mo. App. 1997) (Defendant wearing handcuffs, leg restraints, body restraint. Nothing in the

record to indicate that defendant's hands were visible to the jury); *See State v. Gilmore,* 661 S.W.2d 519 (Mo. banc 1983) (Defendant in leg irons. "[T]he record is destitute of an indication that any juror saw the restraints in place.")

13. The presumption of innocence is such a familiar legal concept that some of its critical importance to the accused may be lost in the sheer banality of this well-worn phrase. Above all else, however, what the presumption of innocence means is that the Accused is entitled constitutionally to the presumption that because he is innocent of the charges, he will voluntarily present himself before the tribunal for trial so that he can vindicate himself and clear his name. Unless and until a guilty verdict is read, or he himself gives the court reason to believe otherwise, the Accused has the right to be viewed by the jury as a willing participant in the judicial process. Restraining an accused does extreme violence to this right. It announces, in stark terms, the belief of the court that the trial is a mere formality in which the outcome in [sic] known and that the Accused, given the opportunity, would flee to avoid facing the inevitable outcome or is so dangerous that he would do violence to persons is the courtroom. If the presumption of innocence to which the Accused is constitutionally entitled is so thoroughly contradicted by the actions of the court, no jury can be expected to accord this principle any credence. A jury allowed to view the Accused in restraints cannot be a fair and impartial jury nor can a trial under such circumstances be conducted in accordance with due process as guaranteed by both the federal and state constitution.

WHEREFORE, it is respectfully requested that the Court allow Mr. Deck to appear at trial free from shackles and restraints.

Respectfully submitted,

/s/ David Bruns by vsl
David Bruns, Mo Bar No.

/s/ Valerie S. Leftwich
Val Leftwich, Mo Bar No.
Attorneys for Defendant

[Overruled /s/ Gary P. Kramer 4-29-2003]

Certificate of Service

I certify that a true copy of the above and foregoing was personally served on all parties this 29th day of April, 2003.

/s/ Valerie S. Leftwich

IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI, Respondent,	)	
vs.	)	No. 85443
CARMAN L. DECK, Appellant.	)	

IN THE CIRCUIT COURT OF MISSOURI
JEFFERSON COUNTY, 23RD JUDICIAL CIRCUIT
Honorable Gary P. Kramer, Judge

STATE OF MISSOURI, Plaintiff,	)	
vs.	)	No. CR196-1084-FX-J2
CARMAN L. DECK, Defendant.	)	

RECORD ON APPEAL
TRANSCRIPT

(April 29, 2003)

* * *

[74] MR. BRUNS: Judge, while we're here can I make a record?

THE COURT: Sure.

MR. BRUNS: It's not concerning voir dire. I just wanted to make a record that Carman is actually in leg-irons and handchains and the defense objects to that. We

think that it is unduly – it prejudices him towards the jury and it makes him look dangerous.

THE COURT: The objection that you're making will be overruled. He has been convicted and will remain in legirons and a belly chain.

* * *

(April 29, 2003)

* * *

[165] [MR. BRUNS] The other thing about Carman that you all either do or will know is that there's chains on him. I guess that's what happens when you get convicted, but I don't want anybody to think anything or to make it more likely that you're gonna render one sentence or another. Is that gonna affect anyone in any way? Let me ask it this way. Everybody over here, can you guarantee me the fact that – I mean he's shackled, his hands, it's not gonna affect you one way or another in the ultimate verdict? Can I see a sign of hands that everybody would agree that it's not gonna affect them whatsoever, yes, it's not going to? Over here, would everybody agree? Is there anyone that it would affect?

* * *

(April 29, 2003)

[257] MS. LEFTWICH: * * * I would ask that or like to move to strike the entire jury panel for cause because of the fact that Mr. Deck is shackled in front of

the jury and makes them think that he is going to – he is violent today and gonna do something in the courtroom or do something to them and it puts fear in their minds, which is not appropriate for someone who's gonna decide the penalty in this case.

THE COURT: On the contrary, him being shackled takes any fear out of their minds.

MS. LEFTWICH: I wouldn't agree with that.

THE COURT: That motion is overruled.

* * *

(April 30, 2003)

[402] MR. JERRELL: * * * Your Honor, at this time I would like to read into the record prior convictions of the Defendant, Carman Deck, I will not be offering all the paperwork of the priors. I will refer to them as exhibit numbers, Your Honor, so the Court may retain them.

THE COURT: Very well.

MR. JERRELL: State's Exhibit number 73, certified copy of prior conviction of Carman Deck. It's from [403] Ste. Genevieve County, case number CR985-92FX, Convicted of the crime of burglary in the second degree, Count one; the crime of stealing, Count two, Date of the crime, June 2nd, 1985. Date of sentence, October 15, 1985. Sentenced to seven years to serve in the Missouri Department of Corrections. State's Exhibit 73.

THE COURT: Which exhibit did you just read?

MR. JERRELL: Number 74.

THE COURT: I misunderstood. I thought you said that was 73.

MR. JERRELL: I may have misspoke, Your Honor.

THE COURT: Very well.

MR. JERRELL: I'm taking these a little out of order because of chronological order. State's Exhibit 76, certified copy of the priors from Ste. Genevieve County of Carman Deck, case number CR985-125FX. It is Count one, Count three, Count four and Count six of burglary in the second degree, four separate counts of burglary in the second degree. Count seven is felony stealing. Date of crime, July 7, 1985. Date of the sentence, October 15, 1985. Sentenced to seven years to serve in the Missouri Department of Corrections. That's State's Exhibit number 76.

Your Honor, I would like to, with the Court's permission, use the chart at this time.

[404] THE COURT: What is the exhibit number, Mr. Jerrell?

MR. JERRELL: The exhibit number is 70. State's Exhibit number 70, very first case is the first case that I read, which is State's Exhibit number 74, showing the case number, the charges, the date of the crime, date of sentence and the sentence. The black represents the term of seven years in the Department of Corrections for that crime.

The next case that you see on the chart is State's Exhibit number 76, the second Ste. Genevieve County case that I just stated, case number, the four counts of burglary

in the second degree, the felony stealing charge, date of crime, date of the sentence, sentence of seven years in the Missouri Department of Corrections. The black indicates started this time here. There's the end of seven years.

State's Exhibit number 75 is right here. It's out of Ste. Genevieve County, case number CR985-187FX. The crime is aiding escape. Date of the crime is July is 23rd, 1985. Date of the sentence, October 15, 1985. The sentence, three years to serve in the Missouri Department of Corrections, consecutive, which means added on to the seven years for these top two cases. So it starts here in 1985, seven years. Here's the extra three.

State's Exhibit 80 is the next case. It's out of St. Francois County, Missouri, CR785-680FX, the crime of [405] felony stealing. The date of crime, May 9th, 1985; date of sentence, October 14th, 1988. Sentenced to five years to serve in the Missouri Department of Corrections. Time starts here, 1988, ends in five years. That's State's Exhibit 80.

State's Exhibit 77 is out of Cape Girardeau, Missouri, right here. Case number is CR588-889F. Charge of burglary, second degree that he was convicted of. The date of the crime, September 8th, 1988. Date of the sentence, December 19th, 1988. Sentence was five years to serve in the Missouri Department of Corrections concurrent to the St. Francois County case. Here we start the time and ends in five years. That's State's Exhibit 77, that crime.

State's Exhibit 78, next case out of Washington County, Missouri, case number CR1092-36FX. The crime is possession of burglary tools, a felony, and attempted burglary in the second degree, also a felony, Count two.

The date of the crimes, December 20th, 1991. Date of sentence, September 8th, 1992, three years in the Missouri Department of Corrections, concurrent, running at the same time with these others was the sentence. So September 8th, 1992 starts right here. Goes for three years to 1995 and ending here. That was State's Exhibit – the prior, State's Exhibit 78.

State's Exhibit 73, right here out of Jefferson County, Missouri. The case is CR192-1251F, the crime of attempted burglary in the second degree. Date of the [406] crime, November 20th, 1991. Date of the sentence, January 7th, 1993. The sentence, three years in the Missouri Department of Corrections, concurrent to what he's already serving. Here's where the three years starts in 1992. Here's where it ends, 1995. That was the prior, Exhibit 73.

* * *

STATE'S EXHIBIT 75

STATE OF MISSOURI)
) SS
COUNTY OF STE. GENEVIEVE)

IN THE CIRCUIT COURT OF THE
COUNTY OF STE. GENEVIEVE

STATE OF MISSOURI

STATE OF MISSOURI,	)	
Plaintiff,	)	
	)	AIDING ESCAPE
vs.	)	Section 575.230, RSM
CARMEN LEE DECK,	)	Class D Felony
a/k/a Pete Deck,	)	No. CR985-187FX
Defendant.	)	

INFORMATION

(Filed Oct. 15, 1985)

The Prosecuting Attorney of the County of Ste. Genevieve, State of Missouri, charges that the defendant, in violation of Section 575.230, RSMo, committed the class D felony of aiding escape of a prisoner, punishable upon conviction under Section s 558.011.1(4) and 560.011, RSMo, in that on or about July 23, 1985 in the County of Ste. Genevieve, State of Missouri, the defendant, for the purpose of effecting the escape of Tom Wolfin and David Ellison, who were being held in confinement in the Ste. Genevieve County jail, a place of confinement, assisted Tom Wolfin and David Ellison by procuring from Linda Wilson a sawblade for use in cutting the jail bars and by helping Tom Wolfin and David Ellison cut through the jail bars with the sawblade.

HERBERT A. KASTEN, JR.
Prosecuting Attorney
County of Ste. Genevieve
State of Missouri

By: /s/ Frank V. DiMaggio
FRANK V. DiMAGGIO
Assistant Prosecuting Attorney

Frank V. DiMaggio, Assistant Prosecuting Attorney of the County of Ste. Genevieve, State of Missouri, being duly sworn, upon oath says that the fact stated in the above Information are true, according to his best information and belief.

By: /s/ Frank V. DiMaggio

Sworn and subscribed to before me this 15th day of October, 1985.

By: /s/ Frank V. DiMaggio
FRANK V. DiMAGGIO
Assistant Prosecuting Attorney

Sworn and subscribed to before me this 15th day of October, 1985.

By: /s/ John J. Oberle, Jr.
Clerk of the Circuit Court
County of Ste. Genevieve
State of Missouri

By: /s/ Pamela Barley
Deputy Clerk

IN THE CIRCUIT COURT OF JEFFERSON COUNTY
STATE OF MISSOURI

[Caption Omitted In Printing]

INSTRUCTION NO. 11

In determining the punishment to be assessed under Count III against the defendant for the murder of Zelma Long, you must first unanimously determine whether one or more of the following statutory aggravating circumstances exists:

1. Whether the murder of Zelma Long was committed while the defendant was engaged in the commission of another unlawful homicide of James Long. A person commits the unlawful homicide of murder in the first degree if he knowingly causes the death of another person after deliberation upon the matter.

2. Whether the defendant murdered Zelma Long for the purpose of the defendant receiving money or any other thing of monetary value from Zelma Long or another.

3. Whether the murder of Zelma Long involved depravity of mind and whether, as a result thereof, the murder was outrageously and wantonly vile, horrible, and inhuman. You can make a determination of depravity of mind only if you find that the defendant killed Zelma Long after she was bound or otherwise rendered helpless by defendant and that defendant thereby exhibited a callous disregard for the sanctity of all human life.

4. Whether the murder of Zelma Long was committed for the purpose of avoiding a lawful arrest of defendant.

5. Whether the murder of Zelma Long was committed while the defendant was engaged in the perpetration of burglary. A person commits the crime of burglary when he knowingly remains unlawfully in an inhabitable structure for the purpose of committing stealing.

6. Whether the murder of Zelma Long was committed while the defendant was engaged in the perpetration of robbery. A person commits the crime of robbery when he forcibly steals property.

You are further instructed that the burden rests upon the state to prove at least one of the foregoing circumstances beyond a reasonable doubt. On each circumstance that you find beyond a reasonable doubt, all twelve of you must agree as to the existence of that circumstance.

Therefore, if you do not unanimously find from the evidence beyond a reasonable doubt that at least one of the foregoing statutory aggravating circumstances exist, you must return a verdict fixing the punishment of the defendant at imprisonment for life by the Department of Corrections without eligibility for probation or parole.

IN THE CIRCUIT COURT OF JEFFERSON COUNTY
STATE OF MISSOURI

[Caption Omitted In Printing]

VERDICT

(Jurors: Use this form only if the punishment you now assess and declare is death. See Instruction No. 10 for directions as to what must be written on this verdict form. The foreperson's signature must appear after the statutory aggravating circumstance or circumstances.)

As to Count I, the defendant Carmen Deck having been found guilty of murder in the first degree of James Long, we, the jury, now assess and declare the punishment at death. We have found the following statutory aggravating circumstance or circumstances beyond a reasonable doubt:

(1)
(2)
(3)
(4)
(5)
(6)

/s/ Virginia L. Frank

IN THE CIRCUIT COURT OF JEFFERSON COUNTY
STATE OF MISSOURI

STATE OF MISSOURI	)	CR196-1084-FX-J2
Plaintiff,	)	
vs.	)	
CARMAN L. DECK	)	
Defendant.	)	

MOTION FOR A SENTENCE OF LIFE WITHOUT PROBATION OR PAROLE OR, IN THE ALTERNATIVE, FOR A NEW PENALTY PHASE TRIAL

(Filed May 27, 2003)

* * *

6. The Court erred in overruling *Defendant's Motion to Have Accused Appear At trial Free of Restraints* for the reasons stated in the motion and on the record at the time of the hearing on the matter. At a pretrial hearing that was not on the record held on April 9, 2003 in chambers, the subject of the Defendant being allowed to wear his own clothes at trial and whether or not he would be shackled was addressed. The Court, on that date, signed an Order for the jail stating that Mr. Deck would be allowed to wear his own clothes during the trial. At the same time, the Court indicated to counsel that Mr. Deck would be wearing only a leg brace underneath his clothes for security purposes. On the morning of jury selection, April 29, 2003, the Court called counsel into chambers and informed them that Mr. Deck was now going to be shackled and handcuffed (with a belly chain) throughout the entirety of the

trial. During the trial there were numerous times when the jury saw Mr. Deck paraded in and out of the courtroom or standing when the judge and jury entered or left the room with his chains, handcuffs, and shackles clearly within view of both the voir dire panels and the actual jury who decided his fate. Denial of this motion deprived Mr. Deck of his rights to due process of the law, a fair trial, to not incriminate himself and impartial jury and to be free from unreasonable searches and seizures cruel and unusual punishment as guaranteed by the 4th, 5th, 6th, 8th, and 14th amendments to the United States Constitution and Article 1, Sections 10, 15, 18(a), 19 and 21 of the Missouri Constitution.

* * *

136 S.W.3d 481

Supreme Court of Missouri,
En Banc.

STATE of Missouri, Respondent,
v.
Carman DECK, Appellant.

No. SC 85443.

May 25, 2004.
Rehearing Denied July 1, 2004.

Rosemary E. Percival, Office of the Public Defender, Kansas City, MO, for appellant.

Jeremiah W. (Jay) Nixon, Atty. Gen., *Evan J. Buchheim*, Asst. Atty. Gen., Jefferson City, MO, for Respondent.

RONNIE L. WHITE, Chief Justice.

I.

A jury convicted Appellant, Carman Deck, of two counts of first-degree murder and recommended a sentence of death for each count.[1] Judgment was entered consistent with the recommendation. Appellant moved for postconviction relief after his convictions and sentences were affirmed on direct appeal.[2] This Court remanded for a new penalty phase, finding that trial counsel's failure to offer proper mitigation instructions during that phase of

[1] Appellant was also convicted of two counts of armed criminal action, one count of first-degree robbery, and one count of first-degree burglary for which he received, respectively, concurrent life sentences, consecutive thirty-year sentences, and a fifteen-year sentence.

[2] *State v. Deck*, 994 S.W.2d 527 (Mo. banc 1999).

the trial constituted ineffective assistance of counsel.[3] On retrial, the jury recommended two death sentences, and judgment was entered consistent with that recommendation. Appellant now asserts nine points of error with his resentencing. This Court has jurisdiction pursuant to Mo. Const. art. V, sec. 3. Affirmed.

II.

In his first point, Appellant contends that the trial court abused its discretion by allowing the admission of a double hearsay statement made to Deputy Sheriff Donna Thomas. Tonia Cummings made the original statement to Charles Hill, who in turn relayed it to Deputy Thomas. The statement was a warning that a robbery and possible murder were going to occur in rural DeSoto, Missouri, involving an elderly gentleman.

"A hearsay statement is any out-of-court statement that is used to prove the truth of the matter asserted and that depends on the veracity of the statement for its value."[4] Charles Hill's statement was offered to explain why the police began a search for the Appellant and a house-to-house search that ultimately led to discovery of the crime scene. Statements made by out-of-court declarants that explain subsequent police conduct are admissible to supply relevant background information and continuity.[5] The trial court did not abuse its discretion when allowing the admission of this out-of-court statement.

[3] *Deck v. State*, 68 S.W.3d 418 (Mo. banc 2002).

[4] *Smulls v. State*, 71 S.W.3d 138, 148 (Mo. banc 2002).

[5] *State v. Dunn*, 817 S.W.2d 241, 243 (Mo. banc 1991).

III.

Next Appellant asserts that the trial court abused its discretion by overruling his motion to appear at trial free of restraints. Appellant believes having to appear before the jury wearing leg irons and handcuffed to a belly chain violated his rights to due process, equal protection, confrontation of the evidence, a fair and reliable sentencing and freedom from cruel and unusual punishment.

The trial court has discretion to impose security measures necessary to maintain order and security in the courtroom, including the use of restraints.[6] "A trial court abuses its discretion when its ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration."[7] "If reasonable persons can differ as to the propriety of the trial court's action, then it cannot be said that the trial court abused its discretion."[8] Recognizing this discretion, however, this Court does not minimize in any way its concern for maintaining a jury that is not prejudiced by extrajudicial influences and passions. Challenging the trial court's discretion to impose security by use of restraints is an individual and fact-specific inquiry.

Trial counsel made no record of the extent of the jury's awareness of the restraints throughout the penalty phase, and Appellant does not claim that the restraints impeded him from participating in the proceedings. There is also

[6] *State v. Armentrout*, 8 S.W.3d 99, 108 (Mo. banc 1999).

[7] *In re Care and Treatment of Spencer*, 123 S.W.3d 166, 168 (Mo. banc 2003).

[8] *Id.*

evidence that there was a risk that Appellant might flee in that he was a repeat offender and evidence from the guilt phase of his trial indicated that he killed his two victims to avoid being returned to custody. While this does not represent a comprehensive list of factors this Court would analyze in making determinations on this issue, there is sufficient evidence in the record to support the trial court's exercise of its discretion to deny Appellant's motion.

Even assuming, arguendo, that the trial court did abuse its discretion in this instance, Appellant has not demonstrated that the outcome of his trial was prejudiced. Appellant offers nothing more than speculation in support of his argument. Neither being viewed in shackles by the venire panel prior to trial, nor being viewed while restrained throughout the entire trial, alone, is proof of prejudice.[9] Moreover, the venire panel was questioned in voir dire, and all members responded that Appellant's appearance in shackles would not affect their decision.

IV.

In Appellant's third point, he argues that the trial court plainly erred when submitting penalty phase instructions numbers 7, 8, 12, and 13. He contends that these instructions did not inform the jury that the State bore the burden of proving aggravating circumstances beyond a reasonable doubt and that mitigating circumstances were insufficient to outweigh the evidence of aggravating circumstances. Appellant believes the wording

[9] *State v. Hall*. 982 S.W.2d 675, 685 (Mo. banc 1998); *State v. Brooks*, 960 S.W.2d 479 (Mo. banc 1997); *State v. Clements*, 849 S.W.2d 640, 647 (Mo.App.1993).

of the instructions could have allowed the jury to infer that the burden of proof was lower than beyond a reasonable doubt. Having not raised this issue at trial, review is under the plain error standard.[10]

These instructions are derived from section 565.030.4 and were appropriately patterned after MAI-CR 3d 313.41, and 313.44.[11] This Court recently addressed this claim and found no error with these patterned instructions.[12] The MAI instructions are constitutional, and there was no plain error in law with their delivery to the jury.[13] Having examined this claim thoroughly and finding no error of law, an extended opinion on these issues would have no precedential value.[14]

V.

Appellant's fourth point raises the issue of whether the trial court erred by failing to read to the jury MAI-CR 3d 300.04.2 – the short version of the jury recess instruction.[15] Appellant claims that the jury's verdict was affected because the court failed to provide the short version of the instruction when: (1) the court divided the jury panel into small groups for death qualification, (2) the small groups

[10] Rule 30.20.

[11] All statutory citations refer to RSMo 2000 unless otherwise noted.

[12] *State v. Taylor,* 134 S.W.3d 21, 30 (Mo. banc 2004).

[13] *Lyons v. State,* 39 S.W.3d 32, 43 (Mo. banc 2001).

[14] Rule 30.25.

[15] Appellant also brought a claim of instructional error with regard to MAI-CR 3d 302.02, but expressly abandoned that claim per letter to this Court dated March 2, 2004.

returned to the larger group, (3) the proceedings ended on the first and second days of trial, and (4) the parties rested their cases. Defense counsel failed to timely object to this alleged error, so this Court reviews for plain error.[16]

To establish that the instructional error rose to the level of plain error, appellant must demonstrate that the trial court so misdirected or failed to instruct the jury that it is evident the instructional error affected the jury's verdict.[17] The jury recess instruction directs the jury not to discuss the case with anyone, including the other jury members, or express or form an opinion of the case until it is submitted for the jury's decision.[18]

The Notes on Use for MAI-CR 3d 300.04 state that the long version, 300.04.1, entitled, "At the First Recess and Adjournment," shall be read at the conclusion of voir dire and if recess occurs during voir dire than [sic] it shall also be read at that time. The short version of this MAI, 300.04.2, is entitled, "At Subsequent Recesses or Adjournments," and the Notes of Use state that it may be given in any other form so long as it complies with section 546.230.

The record reveals that, while Appellant's claimed omissions did occur, the panel was given the full instruction prior to the noon recess during voir dire, again prior to individual voir dire in the afternoon and again when voir dire was completed. During the death qualification phase, the jurors were not in recess while the smaller

[16] Rules 28.03 and 30.20. See also *State v. Wurtzberger,* 40 S.W.3d 893, 897-98 (Mo. banc 2001).

[17] *State v. Baker,* 103 S.W.3d 711, 723 (Mo. banc 2003).

[18] MAI-CR 3d 300.04.2.

groups were interviewed to trigger the need to read the instruction. The instruction was again delivered prior to a recess for dinner, and after dinner the jury was assembled and instructed to return home and pack to prepare for hotel sequestration. On the second day of trial, the instruction was given at every recess, but not at the day's adjournment. On the third day of trial, the instruction was given at every recess except for the one occurring after both parties had rested and before the instruction conference began.

The jury heard the instruction multiple times throughout the course of Appellant's trial, and Appellant offers no evidence that any juror violated the instruction by engaging in discussion about the case or by forming an opinion prior to the completion of the case. The trial court did not so misdirect or fail to instruct the jury that it is evident the instructional error affected the jury's verdict. Appellant's claim fails to establish plain error for the limited omissions in repeating the recess instruction.

VI.

Appellant next argues the trial court abused its discretion with the admission of victim-impact evidence. Specifically, he asserts that an extensive family tree from the victim's family, a narrative statement by the victim's son, and an alleged hearsay statement that the victim's granddaughter was worried and afraid to come to court were excessive and prejudicial.

"[T]he trial court is vested with broad discretion in determining the admissibility of evidence offered at the

penalty stage of a capital case."[19] Victim impact evidence is admissible under the United States and Missouri Constitutions, and the State is permitted to show that a victim is not a faceless stranger and that his or her death represents a unique loss to society and to the family.[20] "[V]ictim impact evidence violates the constitution only if it is so unduly prejudicial that it renders the trial fundamentally unfair."[21]

The chart depicting the victim's family tree, with 46 named family members, was found by the trial court to be less prejudicial than having each of these individuals testify. The chart did contain the names of several family members who had not yet been born at the time of the murders and spouses that were no longer part of the family. This information was provided to the jury; however, the jury was free to decide what impact, if any, the victims' deaths had on those absent family members.

The narrative statement, read by the victims' son, was intended to help prevent him from breaking down emotionally or from making impermissible statements. It was the same statement that was read at Appellant's first trial, and being narrative as opposed to interrogative does not constitute a per se abuse of discretion.[22] As Appellant

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[19] *State v. Johns*, 34 S.W.3d 93, 112 (Mo. banc 2000).

[20] *Deck*, 994 S.W.2d at 538-39; *Payne v. Tennessee*, 501 U.S. 808, 822-25, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991).

[21] *Id.*

[22] *State v. Clark*, 693 S.W.2d 137, 142 (Mo.App.1985). The form of witness examination at trial, whether in a narrative or interrogatory manner, is also a matter committed to discretion of the trial court. *Id.* On direct appeal from Appellant's first convictions and sentences, this Court rejected Appellant's argument that the narrative statement

(Continued on following page)

points out, this statement did include the remark, "How senseless this was to take the nucleus of our family away." However, this remark is not inconsistent with other remarks contained within the narrative, and Appellant provides nothing more than speculation in his attempt to claim that this narrative, or the individual statement, was in any way prejudicial.

Finally, with regard to the victims' daughter's testimony referencing the eleven-year-old granddaughter's fear of coming to court, this would only be a natural response for any child having to attend a courtroom proceeding. Appellant again fails to substantiate his clam [sic] that this statement would somehow allow jurors to speculate that her fear was related solely to Appellant's presence in the courtroom.

In short, all of Appellant's assertions regarding the victim impact evidence are unsubstantiated and based totally in speculation. Defendant's bare assertions of prejudice are not sufficient to establish fundamental unfairness nor do they demonstrate how the outcome of the case was substantively altered.

VII.

In his sixth point, Appellant argues that the trial court abused its discretion by allowing the State, over objection, to personalize its closing argument. Appellant claims that the prosecutor urged the jurors to "relive" the final ten minutes of the victims' lives when they begged for

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produced emotional outbursts so prejudicing his trial that a mistrial was warranted. *Deck*, 994 S.W.2d at 538-39.

mercy while the Appellant contemplated if he would murder them. Appellant believes that allowing this alleged improper argument deprived him of rights to due process, a fair trial and impartial jury, and freedom from cruel and unusual punishment.

"The trial court has broad discretion in controlling the scope of closing argument and the court's rulings will be cause for reversal only upon a showing of abuse of discretion resulting in prejudice to the defendant."[23] "Improper personalization in closing argument occurs when the argument suggests a personal danger to the jurors or their families."[24] Arguing for jurors to supplant themselves in the position of a party or a victim is also improper personalization that can only arouse fear in the jury.[25]

In Appellant's closing argument, defense counsel stated that this was not a planned murder and that Appellant was scared and nervous. Counsel also states, " . . . and he made a lousy, lousy decision. He never should've shot. He never should be been [sic] in there in the first place. He never should've, but it's a split second and on the tape it says he went there to rob."

In response to this argument that the murder was not planned, the prosecutor in his closing argument states, "Think about the evidence. Think about [Appellant] with the gun in his hand, James and Zelma Long lying on the bed. Ten minutes doesn't seem that long. See how long that is just when you're sitting in the jury room. Think

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[23] *Deck*, 994 S.W.2d at 543.

[24] *State v. Bristol*, 98 S.W.3d 107, 115 (Mo.App.2003).

[25] *State v. Williams*, 97 S.W.3d 462, 474 (Mo. banc 2003).

about them on their stomachs begging for their lives for ten minutes."

The evidence of the ten minutes elapsing between the time the victims were ordered to lay on the bed in the positions described and the time of their being shot was properly in the record, and it was not improper to reference these facts in closing argument. The specific reference to these facts in the prosecutor's statements above addressed the credibility of Appellant's claim that the murders were committed without more than a split second's worth of thought. The trial court did not abuse its discretion when overruling Appellant's objection, and there is no evidence, beyond speculation, that the decision to allow the prosecutor's argument to proceed resulted in prejudice to the defendant.

VIII.

Appellant next asserts that the trial court abused its discretion when overruling his objection to striking venirepersons Richard Overmann and Michael Schaeffer for cause. However, "[v]enirepersons may be excluded from the jury when their views would prevent or substantially impair the performance of their duties as jurors in accordance with the court's instructions and their oaths".[26] "A challenge for cause will be sustained if it appears that the venireperson cannot consider the entire range of punishment, apply the proper burden of proof, or otherwise follow the court's instructions in a first degree murder case."[27]

[26] *State v. Smith*, 32 S.W.3d 532, 544 (Mo. banc 2000).

[27] *Id.*

The transcripts show that both prospective jurors indicated that they had a problem with considering the death penalty and that they believed punishment should be limited to life imprisonment without parole. There was serious equivocation expressed by Mr. Overmann and Mr. Schaeffer about their ability to follow the instructions of the court and their ability to consider and recommend the full range of punishment for Appellant. "A juror's equivocation about his ability to follow the law in a capital case together with an equivocal statement that he could not sign a verdict of death can provide a basis for the trial court to exclude the venireperson from the jury."[28] The trial court did not abuse its discretion when sustaining the prosecutor's motion to strike.

IX.

Appellant raises, as his eighth point, this Court's independent proportionality review and advocates for reducing his sentence to life imprisonment without parole. Under section 565.035.3, this Court is required to determine whether:

> (1) The sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor;
>
> (2) The evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in subsection 2 of section 565.032 and any other circumstance found;

[28] *Id.*

(3) The sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime, the strength of the evidence, and the defendant.

Having thoroughly reviewed the record, this Court concludes that there is no evidence to suggest that the punishment imposed was a product of passion, prejudice, or any other arbitrary factor.

The trial court's findings are next reviewed to determine if the evidence supports, beyond a reasonable doubt, the existence of an aggravating circumstance and any other circumstance found. In Appellant's first trial, the jury unanimously found six statutory aggravating circumstances as a basis for considering the two death sentences.[29] The same evidence was heard in Appellant's retrial of the penalty phase, and it amply supports the statutory aggravators found by the jury when delivering its recommendation for the death sentence.

Finally, this Court has upheld sentences of death in similar cases where the defendant murdered multiple victims, acted for pecuniary gain, or where the defendant

[29] The jury found: 1) that each murder was committed while the defendant was engaged in the commission of another unlawful homicide, section 565.032.2(2); 2) that the murders were committed for the purpose of receiving money or any other thing of monetary value, section 565.032.2(4); 3) that the murders were outrageously and wantonly vile, horrible, and inhuman in that they involved depravity of mind, section 565.032.2(7); 4) that the murders were committed for the purpose of avoiding a lawful arrest, section 565.032.2(10); 5) that the murders were committed while defendant was engaged in the perpetration of burglary, section 565.032.2(11); and 6) that the murders were committed while defendant was engaged in the perpetration of robbery, section 565.032.2(11). *Deck*, 994 S.W.2d at 545.

sought to eliminate possible witnesses to avoid a lawful arrest.[30] The death sentences in this case are neither excessive nor disproportionate to the penalty imposed in similar cases, considering the crime, the strength of the evidence, and the defendant.

X.

Appellant finally argues that the trial court lacked jurisdiction and authority to sentence Appellant because the state failed to charge him with "aggravated first-degree murder." Appellant contends that failure to plead facts, as listed in section 565.030.4, creates a charge of murder whereby the maximum penalty was life in prison.

This Court has addressed this claim numerous times before. The omission of statutory aggravators from an indictment charging the defendant with first-degree murder does not deprive the sentencing court of jurisdiction to impose the death penalty.[31] Missouri's statutory scheme recognizes a single offense of murder with maximum sentence of death, and the requirement that aggravating facts or circumstances be present to warrant imposition of death penalty does not have the effect of increasing the maximum penalty for the offense.[32] Having examined this claim thoroughly and finding no error of

[30] *State v. Ringo*, 30 S.W.3d 811(Mo. banc 2000); *State v. Worthington*, 8 S.W.3d 83, 93 (Mo. banc 1999); *State v. Middleton*, 998 S.W.2d 520 (Mo. banc 1999).

[31] *State v. Cole*, 71 S.W.3d 163, 171 (Mo. banc 2002).

[32] *Id.* See also *State v. Tisius*, 92 S.W.3d 751, 766 (Mo. banc 2002).

law, an extended opinion on these issues would have no precedential value.[33]

XI.

The judgment is affirmed.

All concur.

[33] Rule 30.25.

(5)

No. 04-5293

Supreme Court, U.S.
FILED
DEC 16 2004
OFFICE OF THE CLERK

In The

Supreme Court of the United States

CARMAN L. DECK,

Petitioner,

v.

STATE OF MISSOURI,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Missouri

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Are the Sixth, Eighth, and Fourteenth Amendments violated by forcing a capital defendant to proceed through penalty phase while shackled and handcuffed to a belly chain in full view of the jury, and if so, doesn't the burden fall on the State to show that the error was harmless beyond a reasonable doubt, rather than on the defendant to show that he was prejudiced?

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OPINIONS BELOW

The opinion of the Missouri Supreme Court at issue here is reported at 136 S.W.3d 481 (Mo.banc 2004) (J.A.70-84). The Missouri Supreme Court issued two other opinions relating to Petitioner's current convictions and sentences: *State v. Deck*, 994 S.W.2d 527 (Mo.banc 1999) (J.A.6-39), and *Deck v. State*, 68 S.W.3d 418, 422 (Mo.banc 2002).

JURISDICTION

The judgment of the Missouri Supreme Court was entered on May 25, 2004 (Cert.Pet.App.1-10). Petitioner's timely motion for rehearing (Cert.Pet.App.11-22) was denied on July 1, 2004 (Cert.Pet.App.23). The petition for certiorari was filed on July 15, 2004 and was granted on October 18, 2004. This Court has jurisdiction under 28 U.S.C. § 1257(a) (2000).

CONSTITUTIONAL PROVISIONS INVOLVED

Sixth Amendment: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury . . . and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

Eighth Amendment: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Fourteenth Amendment, Section I: " . . . Nor shall any state deprive any person of life, liberty, or property, without due process of law . . . "

STATEMENT OF THE CASE

I. Procedural History

On August 27, 1996, the State returned a felony information charging Carman Deck with two counts of first degree murder, two counts of armed criminal action, one count of first degree robbery, and one count of first degree burglary regarding events that took place on July 8, 1996 (1st L.F.43-44).[1] On the same day, it gave notice that it intended to seek a death sentence (1st L.F.45).

In his first months in jail, Deck was emotionally distraught, banging his head on the wall and removing caulking from a jail window (PCR Tr.153,224; Ex. 66, Surratt Depo.). Jailors placed him on suicide watch, and counsel obtained a competency evaluation (PCR Tr.153-54; Ex. 66, Surratt Depo.).

The case went to trial on February 17, 1998 (1st L.F.26). By order of the court, Deck was dressed in civilian

[1] The Joint Appendix is referenced "J.A." The legal file and transcript from the penalty phase retrial are referenced "L.F." and "Tr.," respectively. The record includes the transcript of the deposition of Michael Deck, referenced "M.D.Depo." The legal file and transcript from the first appeal, *State v. Deck*, 994 S.W.2d 527 (Mo.banc 1999), are referenced "1st L.F." and "1st Tr.," respectively. Counsel has requested permission to lodge with the Court relevant testimony and evidence admitted at the hearing on Deck's motion for postconviction relief. That transcript is referenced as "PCR Tr." and the depositions admitted into evidence are referenced by the deposed party's last name.

clothes and restrained in leg braces, not visible to the jury (J.A.5). After a three-day trial, the jury found Deck guilty on all counts (1st L.F.26-29). After a one-day penalty phase, the jury imposed a death sentence (1st Tr.951-52).

On appeal, the Missouri Supreme Court affirmed Deck's convictions and sentences. *State v. Deck*, 994 S.W.2d 527 (Mo.banc), *cert. denied*, 528 U.S. 1009 (1999) (J.A.6-39). Deck filed a motion for postconviction relief, alleging that his trial counsel was ineffective for failing to object that submitted instructions lacked required language regarding mitigating circumstances. *Deck v. State*, 68 S.W.3d 418, 422 (Mo.banc 2002). The Missouri Supreme Court agreed with Deck and reversed for a new penalty phase. *Id.* at 430-32.

The penalty phase retrial commenced on April 29, 2003, almost seven years after the crimes occurred (Tr.1).[2] About three weeks prior to trial, the court indicated in a pretrial conference that Deck would be required to wear leg braces under his clothing (J.A.68).[3] On the morning of trial, however, Deck was led into court wearing legirons and handcuffed to a belly chain (J.A.68-69).

In response, defense counsel immediately filed a motion objecting to any use of physical restraints at trial (J.A.41-56). Counsel argued that Deck had disrupted no court proceedings throughout the pendency of his case and was entitled to appear before the jury without restraints unless the use of restraints was supported by good cause

[2] The same judge presided over the initial trial, the postconviction motion proceedings, and the penalty phase retrial.

[3] The conference was held off the record but was referenced in defense counsel's motion for new trial (J.A.68).

(J.A.41-42). Counsel argued that shackling a defendant was an inherently prejudicial practice that should be permitted only when justified by an essential state interest specific to each trial (J.A.44).

Counsel's motion provided numerous alternatives to the use of visible, physical restraints. Using prior cases as examples, the motion suggested methods to avoid shackling altogether, such as adding extra guards in the courtroom or requiring all spectators to pass through a metal detector before entering the courtroom (J.A.46). Suggesting an alternative, intermediate approach, the motion also used as examples cases in which the courts took various measures to reduce the prejudicial effect of the restraints, such as concealing the defendant's shackled legs from the jury by placing boxes around the defense table; ensuring that the defendant was never paraded before the jury with the restraints; or using restraints that would not rattle or be seen easily (J.A.47-50). The Court summarily overruled counsel's motion (J.A.56).

During voir dire, defense counsel renewed their objection to the use of visible restraints (J.A.57-58). Counsel noted that Deck "is actually in legirons and handchains" and argued that the visible shackles prejudiced Deck by making him look dangerous (J.A.57-58). The court responded: "The objection that you're making will be overruled. He has been convicted and will remain in legirons and a belly chain" (J.A.58).

Defense counsel briefly questioned the jurors about the restraints, offering that the jurors "either do or will know" that there's "chains" on Deck and that "he's shackled, his hands" (J.A.58). Counsel suggested, "I guess that's what happens when you get convicted" and asked if that

would sway any of the jurors to render one sentence or another (J.A.58). By raising their hands, the jurors indicated that the chains would not affect them (J.A.58).

Toward the end of voir dire, defense counsel moved to strike the panel because Deck had been shackled before the jurors (J.A.58-59). Defense counsel argued that the restraints would make the jury think that Deck was currently violent and would do something in the courtroom or do something to the jurors (J.A.59). Counsel argued that the restraints put fear into the jurors' minds, something inappropriate for those who would be deciding punishment (J.A.59). The court overruled the motion, stating that the shackling "takes any fear out of [the jurors'] minds" (J.A.59).

II. Evidence Adduced at Trial

At this penalty phase retrial, the jury's duty was to determine whether Deck's punishment was to be life without parole or the death penalty. §565.030.4.[4] To do so, it was required to follow a four step process. First, the jury was to determine unanimously whether the State had proved a statutory aggravating circumstance beyond a reasonable doubt. §565.030.4(1). Second, the jury was to determine unanimously and beyond a reasonable doubt whether the evidence in aggravation of punishment warranted a death sentence. §565.030.4(2).[5] Third, the jury was to determine whether the evidence in mitigation

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[4] *See* Appendix for text of statute. All statutory references are to the Missouri Revised Statutes, 2000 edition, unless otherwise indicated.

[5] The statute was amended in 2001, eliminating this step. §565.030.4, RSMo Cum. Supp. 2001.

outweighed the evidence in aggravation. §565.030.4(3). Finally, the jury was to exercise its discretion to decide whether to impose a death sentence or a sentence of life without parole. §565.030.4(4).

The State presented evidence that Deck confessed to the police that he robbed and killed an elderly couple, James and Zelma Long, at their home on July 8, 1996 (Tr.436-37; Ex.69). Deck knew the Longs kept large sums of money in a safe in their bedroom (Tr.439; Ex.69). He and his sister knocked on the Longs' door and asked for directions (Tr.440; Ex.69). The Longs invited them in and gave them directions (Tr.440; Ex.69). As Deck headed to the door, he pulled a gun, pointed it at the Longs, and ordered them to lie on their bed (Tr.441; Ex.69). Deck took about $410 from them (Tr.443; Ex.69). Deck, nervous and scared, contemplated what to do for ten minutes as the Longs begged for their lives (Tr.442; Ex.69). He knew that if he left them alive he would be sent to jail, but he also knew that if he shot them, he would go to jail (Ex. 69). Deck's sister had been standing at the front door but ran back toward the bedroom and yelled that they needed to leave (Ex.69; Tr.442). Deck heard her run out to the car and the screen door slam shut (Ex.69). Not knowing what to do, Deck "just shot them" both twice in the head (Ex.69; Tr.442). Later that evening, Deck was apprehended (Tr.291). He initially denied any involvement, but, a few hours later, confessed to the crimes (Tr.431-32,435-37).

The State presented evidence that Deck had twelve nonviolent prior felony convictions (J.A.59-62). The convictions were for second degree burglary, attempted second degree burglary, felony stealing, possession of burglar's tools, and aiding an escape (J.A.59-62). As to the last conviction, Deck admitted that in 1985, he helped two

other inmates escape from a county jail, by procuring a sawblade and helping the others saw through their jail bars (J.A.62-63).

The State also presented victim impact testimony from the victims' two daughters and one son (Tr.387-400,410-21). They described their parents and how their deaths had affected them, their family, and friends of the family (Tr.387-402,410-421).

Deck did not testify but presented the testimony of various family members, a foster parent, and a child psychiatrist. Deck was born to the troubled and unstable union of Pete and Kathy Deck. Kathy was unable to provide even the most basic parenting needs, such as affection, food, and clothing (Tr.484,501). She was never at home but instead, "liked to get out and flaunt it, run around with other men" (Tr.467). Deck often went without food and once, as an infant, was so dehydrated from lack of food and water that he had to be hospitalized (Tr.484).

Kathy punished Deck brutally. When Deck was two or three, she whipped him hard enough to raise welts because he made too much noise while playing (Tr.497). She later forced him to sit in a corner for hours, and if he so much as whimpered, she cursed and screamed at him (Tr.497).

Pete had even less ability to parent Deck and preferred to remain estranged from his child (Tr.484). He left money that was supposed to be for Deck, but never made the effort to ensure that it actually helped feed or clothe his child (Tr.485). Deck's parents often went out at night to bars and left him alone (Tr.485).

Kathy and Pete had three more children (Tr.485-86, 498). From about age five, Deck was placed in charge of the other children and took on the role of parent (Tr.485-86; M.D.Depo.8). He gathered whatever food was available – perhaps a stick of butter or dry dog food (Tr.487,506). At times, he stole food so they could eat (M.D.Depo.8). Deck clothed and cleaned his brother and sisters, including his mentally retarded sister (Tr.487-88). The children wore the same clothes – even the same diapers – for days (Tr.488). Deck was the primary caregiver for his siblings until he was in late elementary school, when a mentally retarded uncle occasionally cared for them (Tr.468,485,507).

When Deck was nine or ten, Pete left Kathy (Tr.489). Child welfare agencies became involved when, a few days before Thanksgiving, Kathy ran off with a truck driver for three days and left the children alone, filthy, and without food (Tr.468-69,490). The children were taken to a relative's house for Thanksgiving dinner (Tr.455,461,490; M.D.Depo.9-10). Deck's three-year-old brother was so hungry that he wolfed down his food, threw it up on his plate, and then tried to re-eat it (Tr.456,469,490; M.D.Depo.9-10).

When Deck was twelve, the children moved in with Pete and his new wife, a bad alcoholic (Tr.493). Deck's stepmother made the children kneel on broomsticks in the corner, and she slapped and spanked them, or pulled their hair (M.D.Depo.13-14). She was especially malicious in punishing Deck (Tr.493). One time, she told the children to sit in the car and not leave to use the bathroom (Tr.494). After several hours, Deck defecated in his pants (Tr.494; M.D.Depo.12-13). Upon his stepmother's return, she smeared Deck's feces on his face (Tr.472,494; M.D.Depo.12-13). She made him leave it there, allowing it to cake and

dry, so that all that could be seen through the feces were Deck's eyes (Tr.472,494). Meanwhile, she verbally abused him, telling him how embarrassed he should be of himself (Tr.494). She photographed Deck and told him she would show everyone the picture and tell everyone what he had done (Tr.494).

One evening, the children heard their stepmother give their father an ultimatum – he must choose her or them (M.D.Depo.14). The next day, Deck was shipped back to his mother, and the three other children were sent to an uncle (Tr.462-63,491; M.D.Depo.14).

Deck began a long string of foster home placements, interrupted by brief stints with his mother (Tr.491). Kathy repeatedly retrieved Deck from foster homes, only to abandon him again (Tr.491).

At age fourteen or fifteen, Deck spent about a year in the foster home of Reverend Major Puckett (Tr.526,528). He did well and fit in "just like he was born there" (Tr.528). Reverend Puckett described Deck as a very likable boy who never argued and always did his chores (Tr.526,528). Deck treated his blind foster mother as if she were his own mother:

> He would read the instructions off the cans to her [when she'd cook] and help her in the kitchen and he just tried to take all the work off of her that he could. He was like a son to her.

(Tr.529). The foster family wanted to adopt Deck, but Deck was again given back to his mother (Tr.530). Deck argued that he should be able to stay, since making him leave was "killing me on the inside" (Tr.530).

In his mid-teen years, Deck was reunited with his siblings (M.D.Depo.16). His brother "really enjoyed" being with Deck, whom he had seen only at birthdays and holidays for the past seven years (M.D.Depo.16,19). Deck started getting in trouble for stealing and burglary, but when he was out of prison, he spent "quality time" with his young niece (M.D.Depo.17). Deck always bought her things, took her places, and generally treated her "like a princess" (M.D.Depo.17). Deck's brother loves him and always will and has visited him in prison (M.D.Depo.17, 26-27).

In closing argument, defense counsel argued that Deck would do well in a structured prison environment and would never hurt anyone else (Tr.555). Counsel further argued that killing another human in self-defense is justifiable, but that the jury did not need to do that since Deck would be in prison for the rest of his life (Tr.558).

The jury found six statutory aggravating circumstances for each of the two counts of first degree murder: (1) that the murders were committed while Deck was engaged in the commission of another unlawful homicide; (2) that Deck murdered the victims for the purpose of receiving money or any other thing of monetary value; (3) that the murders involved depravity of mind; (4) that the murders were committed for the purpose of avoiding a lawful arrest; (5) that the murders were committed while Deck was engaged in the perpetration of burglary; and (6) that the murders were committed while Deck was engaged in the perpetration of robbery (J.A.65-67). The jury returned verdicts recommending death (Tr.563).

In the motion for new trial, defense counsel provided further detail regarding the physical restraints used at trial (J.A.68-69). Counsel recounted the numerous times the jury clearly saw Deck – chained, handcuffed and shackled – paraded in and out of the courtroom or standing when the judge and jury entered or left the courtroom (J.A.69). At sentencing, neither the court nor the prosecutor disputed these facts. The court overruled the motion for new trial and imposed death (L.F.51-52).

On appeal, Deck argued that the trial court abused its discretion in overruling his "Motion to Have Accused Appear at Trial Free of Restraints" and in forcing him to appear throughout the penalty phase in legirons and handcuffed with a belly chain (App.Br.62-77). He argued that this action deprived him of his rights to due process, equal protection, a fair and reliable sentencing, to confront the evidence against him, and freedom from cruel and unusual punishment, as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution (App.Br.62-63).

The Missouri Supreme Court stressed that the trial court has discretion to impose security measures necessary to maintain order and security in the courtroom, including the use of restraints. *State v. Deck*, 136 S.W.3d 481, 485 (Mo.banc 2004) (J.A.72). It held that the record supported the court's use of restraints, noting that (1) it could be assumed that Deck was a flight risk, since he was a repeat offender who killed the victims to avoid being returned to custody; (2) defense counsel "made no record of the extent of the jury's awareness of the restraints throughout the penalty phase;" and (3) Deck did not claim that the restraints impeded his participation in the proceedings. *Id*.

(J.A.72-73). The Missouri Supreme Court further held that,

> Even assuming, arguendo, that the trial court did abuse its discretion in this instance, [Deck] has not demonstrated that the outcome of his trial was prejudiced. [Deck] offers nothing more than speculation in support of his argument. Neither being viewed in shackles by the venire panel prior to trial, nor being viewed while restrained throughout the entire trial, alone, is proof of prejudice.

Id. (J.A.73). The court stressed that the venire panel was questioned in *voir dire*, and all members responded that Deck's appearance in shackles would not affect their decision. *Id.* at 486 (J.A.73).

SUMMARY OF THE ARGUMENT

Shackling a defendant jeopardizes rights that are essential to a fair trial and due process, such as the presumption of innocence, the right of confrontation, and the right to an impartial, unbiased jury. Shackling diminishes the presumption of innocence by affecting how the jury views the defendant – the shackles make the defendant look guilty. Shackling therefore allows the jurors to convict based on mere suspicion rather than evidence proven in court and subject to cross-examination. Shackling also limits the defendant's ability to participate in the proceedings, and it is an affront to the dignity and decorum of the courtroom.

In response to these problems, the Court has established a standard that also protects essential state interests. Trial

courts may order that a defendant be physically restrained, but only if the restraints further an essential state interest specific to the trial, and only if they are used as a last resort. *Illinois v. Allen*, 397 U.S. 337 (1970); *Estelle v. Williams*, 425 U.S. 501 (1976); *Holbrook v. Flynn*, 475 U.S. 560 (1986). This standard has been universally accepted and has proven effective.

The interests at stake in a capital sentencing trial are as important as the interests affected by restraints in the guilt phase and may be more vulnerable to erosion by shackling. A capital sentencing trial is an extension of the guilt phase. The jury must determine whether the State has established the death-eligibility factors beyond a reasonable doubt. Until the State has done so, a presumption exists that the defendant is "innocent" of the death penalty. A key consideration for any capital sentencing jury is whether the defendant would pose a future danger if sentenced to life without parole. Shackling the defendant suggests a frightening answer to this question. Just as shackling implicates the presumption of innocence in the guilt phase by making the defendant look particularly guilty, shackling in the penalty phase makes the defendant look particularly dangerous. Thus, shackling allows the jury to make negative assumptions about aspects of the defendant's character that are likely to be of critical importance for its sentencing choice and to consider them in its deliberations – although they were not proven by evidence or subject to confrontation by the defense. As in the guilt phase, shackling limits the defendant's ability to participate in the proceedings. It undercuts the need for reliability that is crucial in capital sentencing proceedings.

This Court should apply the *Allen*, *Estelle*, and *Holbrook* standard to the penalty phase. The Court should

find that shackling violates the Constitution unless a properly supported finding is made on the record, after due inquiry, that (1) there is a need to shackle the defendant to further an essential state interest specific to the case at bar; and (2) lesser measures would not suffice to protect that essential state interest. This standard would protect the defendant's rights to due process and a fair trial, society's interests in reliable capital sentencing procedures, and the State's interests in the security of the courtroom.

Claims that a trial court's error in shackling a capital defendant is harmless should be reviewed under the familiar standard of *Chapman v. California*, 386 U.S. 18 (1967). Shackling jeopardizes numerous constitutional guarantees, and the Court has indicated that the *Chapman* standard is particularly appropriate when the impact of a constitutional violation is subtle and hard to quantify, as it is with shackling.

Here, Carman Deck was ordered to proceed throughout his capital sentencing trial in legirons and handcuffed to a belly chain, even though the trial court made no supportable factual findings of a specific justification for the restraints, failed to consider alternative security procedures before resorting to shackling, and took no measures to ensure that the restraints were the least restrictive possible. This procedure violated Deck's constitutional rights to meet and challenge the prosecution's case for death in a fair and reliable sentencing proceeding.

The State cannot show that the error was harmless. The legirons and handcuffs were visible to the jury throughout the trial. Although the crime was an ugly one, Deck's evidence in mitigation was substantial. In such a

close case, the *Chapman* standard will not tolerate the risk that shackling gave the jurors an unwarranted impression Deck remained particularly dangerous and that this impression affected their weighing of the evidence in aggravation and in mitigation. Because the State cannot show that Deck's appearance before the jury – in legirons and handcuffed to a belly chain – did not contribute to the death verdict, Deck should receive a new sentencing trial.

ARGUMENT

I. Compelling a criminal defendant to appear before the jury in physical restraints, without sufficient justification, jeopardizes basic federal constitutional rights.

The Constitution endows every criminal defendant with a set of interconnected rights that work together to ensure a fair trial on reliable evidence: the presumption of innocence, the right to be present and confront the prosecution's proof, the right to cross-examine witnesses, and the right to have the facts determined solely on the evidence by an impartial, unbiased trier of fact. Each of these rights is jeopardized when the defendant is forced to appear in physical restraints before the jury.

The presumption of innocence originated in ancient times, was adopted through English common law, and has emerged as a bedrock principle of American jurisprudence. *Coffin v. United States*, 156 U.S. 432, 453-56 (1895). It is implicit in the right to a fair trial and is the "undoubted law, axiomatic and elementary" in a criminal trial. *Estelle v. Williams*, 425 U.S. 501, 503 (1976). Enforcement of the

presumption of innocence "lies at the foundation of the administration of our criminal law." *Coffin*, 156 U.S. at 453.

Implicit in the presumption of innocence is the principle that jurors may consider only evidence presented in court. "One accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial." *Taylor v. Kentucky*, 436 U.S. 478, 485 (1978).

That principle, in turn, dovetails with the defendant's right to confront the evidence and cross-examine witnesses. "[A] fact which can be primarily established only by witnesses cannot be proved against an accused ... except by witnesses who confront him at the trial, upon whom he can look while being tried, whom he is entitled to cross-examine, and whose testimony he may impeach in every mode authorized by the established rules governing the trial or conduct of criminal cases." *Kirby v. United States*, 174 U.S. 47, 55 (1899). The right to confront one's accusers is "essential to a fair trial in a criminal prosecution," *Pointer v. Texas*, 380 U.S. 400, 404 (1965), and, with the right to cross-examine the witnesses, "ensur[es] the integrity of the fact-finding process." *Kentucky v. Stincer*, 482 U.S. 730, 736 (1987).

To aid confrontation and the truth-finding function of the trial, the defendant has a right to be present at his trial. The right to be present flows from the Sixth Amendment's Confrontation Clause and, when the defendant is not actually confronting witnesses or evidence against him, the Due Process Clause. *Snyder v. Massachusetts*,

291 U.S. 97, 105-106 (1934); *United States v. Gagnon*, 470 U.S. 522, 526 (1985). The defendant's presence is essential to his opportunity to defend against the charges. *Snyder*, 291 U.S. at 106. It enables the defendant to assist his lawyer, *id.*, and to testify in his defense. *Rock v. Arkansas*, 483 U.S. 44, 51 (1987). It also furthers the "fundamental assumption of the adversary system that the trier of fact observes the accused throughout the trial, while the accused is either on the stand or sitting at the defense table." *Riggins v. Nevada*, 504 U.S. 127, 142 (1992) (Kennedy, J., concurring).

Together, these rights advance an undeniable goal of the legal system – to arrive at the truth. *United States v. Havens*, 446 U.S. 620, 626 (1980). A procedure that frustrates "the discovery of truth in a court of law impedes as well the doing of justice." *Hawkins v. United States*, 358 U.S. 74, 81 (1958) (Stewart, J., concurring). The need for truth-finding and accuracy extends to sentencing. *See, e.g., Townsend v. Burke*, 334 U.S. 736, 741 (1948).

Each of these rights is jeopardized when a defendant is shackled at trial. In *Illinois v. Allen*, 397 U.S. 337 (1970), this Court stressed that shackling and gagging a defendant has "serious shortcomings." *Id.* at 345. The Court expressed concern that "the sight of shackles and gags might have a significant effect on the jury's feelings about the defendant." *Id.* at 344.[6] The restraints also create "something of an affront to the very dignity and decorum of judicial proceedings that the judge is seeking

[6] Justice Kennedy, writing for the court in *Spain v. Procunier*, 600 F.2d 189, 198 (9th Cir. 1979), recognized that the general population is not accustomed to seeing prisoners and the "presence of the shackles may confirm their worst beliefs about felons."

to uphold." *Id.* They "offend[] not only judicial dignity and decorum, but also that respect for the individual which is the lifeblood of the law." *Id.* at 350-51 (Brennan, J., concurring). In addition, they greatly reduce the defendant's ability to communicate with his counsel. *Id.* at 344. Because of these "inherent disadvantages and limitations," "no person should be tried while shackled and gagged except as a last resort." *Id.* at 344-45.

Shackling jeopardizes the right to be present by affecting the defendant's ability to participate fully in the proceedings and by tainting his appearance before the jury. In *Riggins v. Nevada*, 504 U.S. 127, 134-38 (1992), where a mentally ill individual was medicated over his objection throughout both phases of his capital trial, this Court recognized that a defendant has the right to be free from a State-imposed condition that diminishes his ability to participate fully in the proceedings and that may prejudice the jury against him. Balancing Riggins' rights against the State's interests, the Court reiterated that a defendant could not be forcibly medicated at his trial unless the State established that the medication was medically appropriate; that it was essential for the defendant's safety or the safety of others; and that less intrusive alternatives had been considered. *Id.* at 135. Because Riggins was forcibly medicated without such a showing and the error could have impaired his constitutionally-protected trial rights, the Court reversed his conviction. *Id.* at 136-38. "It is clearly possible that . . . [the] side effects [of the medication] had an impact upon not just Riggins' outward appearance, but also the content of his testimony on direct or cross examination, his ability to follow the proceedings, or the substance of his communication with counsel." *Id.* at 137. The defendant must be free

to communicate effectively with counsel at every critical stage of the proceedings. *Geders v. United States*, 425 U.S. 80, 89 (1976), citing *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932).

Justice Kennedy's concurring opinion in *Riggins* emphasized that forced medication can make a defendant appear before the jury in such a way as to cast a negative light on his character. A key component of the right to be present at trial is the opportunity to present oneself to the observation of the jury. *Riggins*, 504 U.S. at 142 (Kennedy, J., concurring). "At all stages of the proceedings, the defendant's behavior, manner, facial expressions, and emotional responses, or their absence, combine to make an overall impression on the trier of fact, an impression that can have a powerful influence on the outcome of the trial." *Id.* Through control of the defendant's appearance, the State can create a prejudicial negative demeanor that, although subtle, "does not make [it] any less real or potentially influential." *Id.* at 143. "Serious due process concerns are implicated when the State manipulates the evidence in this way." *Id.* at 142.

By affecting how the jury views the defendant, shackling diminishes the defendant's right to be presumed innocent. In *Estelle*, *supra*, Chief Justice Burger, writing for the Court, recognized that the appearance of a defendant before the jury in jail clothing diminishes the presumption of innocence, since "the constant reminder of the accused's condition implicit in such distinctive, identifiable attire may affect a juror's judgment." 425 U.S. at 504-505. The defendant's clothing "is so likely to be a continuing influence throughout the trial that . . . an unacceptable risk is presented of impermissible factors coming into play." *Id.* at 505. Finding that no essential state interest

was furthered by requiring criminal defendants to wear jail clothing, the Court held that the practice violated the defendant's Fourteenth Amendment rights to due process and equal protection. *Id.* at 505-506, 512.[7]

In *Holbrook v. Flynn*, 475 U.S. 560 (1986), the defendant alleged that his rights to a fair trial, under the Sixth and Fourteenth Amendments, were violated by the visible, heightened security measures used at his trial. *Id.* at 567-68. To resolve the question presented, the Court balanced the State's interest in courtroom security against the defendant's right to a fair trial. The Court recognized that certain practices, like shackling or requiring the defendant to wear prison clothing, are inherently prejudicial, since they are "unmistakable indications of the need to separate a defendant from the community at large." *Id.* at 568-69. Thus, these practices "should be permitted only where justified by an essential state interest specific to each trial." *Id.* In contrast, however, the presence of guards did not necessarily indicate that the defendant was particularly dangerous or culpable and so was not inherently prejudicial. *Id.* at 569.[8]

[7] The Court, however, held that the defendant had waived the right by failing to request that he not be tried wearing jail clothing. *Id.* at 509-12.

[8] The Court reasoned that the jurors may have believed that the guards were there to protect against disruptions arising from outside the courtroom, or to deter tense courtroom exchanges from deteriorating into violence; or the jurors may not have inferred anything at all from the guards' presence, since armed guards have become commonplace in public places. *Id.* The Court suggested that the guards' presence may not be given much import "so long as their numbers or weaponry do not suggest particular official concern or alarm." *Id.*

Shackling allows the defendant to be convicted based on factors that were not presented as evidence in court. Shackles therefore violate the defendant's right to be judged only on evidence presented in court, *Taylor*, 436 U.S. at 485, and the right to confront the evidence and cross-examine witnesses. Shackling also interferes with the defendant's right to a fair and reliable sentencing determination, by interjecting into the sentencer's deliberations negative impressions that, although potentially untrue, the defendant is disabled from refuting effectively. *See, e.g., Townsend*, 334 U.S. at 741 (due process violated when a defendant lacking counsel is sentenced based on untrue assumptions).

Through *Allen*, *Estelle*, and *Holbrook*, the Court recognized that shackling a defendant has "inherent disadvantages and limitations" that jeopardize the defendant's constitutional rights. *Allen*, 397 U.S. at 344. Shackles affect how the jury views the defendant. They impair the presumption of innocence, by making the defendant look dangerous, hence, guilty. They interfere with the defendant's ability to communicate with counsel and participate fully in the trial. Shackles demean the dignity and decorum of the courtroom and the respect for the individual, "which is the lifeblood of the law."

Other courts have expounded on the dangers of shackling. Shackles may confuse or embarrass the defendant, thereby distracting him from the proceedings. *Eaddy v. People*, 115 Colo. 488, 491, 174 P.2d 717, 718 (Colo. 1946). They may interfere with the defendant's thought processes and ability to communicate with counsel. *State v. Tolley*, 290 N.C. 349, 366, 226 S.E.2d 353, 367 (N.C. 1976). Shackling may impede a defendant from testifying, which in turn, may deny the defendant the right to present his defense

altogether. *See, e.g., Hardin v. Estelle*, 365 F.Supp. 39, 46 (W.D.Tex.), *aff'd*, 484 F.2d 944 (5th Cir. 1973); *see also People v. Duran*, 16 Cal.3d 282, 288, 545 P.2d 1322, 1326 (1976).

To forestall these unacceptable consequences, American courts universally have adopted the standard set forth in the trilogy of *Allen*, *Estelle* and *Holbrook* for guilt-phase trials. American courts abide by the standard that the use of physical restraints in the courtroom is permissible only when justified by an essential state interest specific to each trial, and only as a last resort.[9] *Allen*, 397 U.S. at 344; *Estelle*, 425 U.S. at 505; *Holbrook*, 475 U.S. at 568-69. This standard has proven a workable, effective means of balancing the defendant's rights to due process and a fair trial, and the State's interest in courtroom security.

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[9] The American Bar Association's standards are in accord:

> (c) No defendant should be removed from the courtroom, nor should defendants and witnesses be subjected to physical restraint while in court unless the court has found such restraint necessary to maintain order. Removing a defendant from the courtroom or subjecting an individual to physical restraint in the courtroom should be done only after all other reasonable steps have been taken to insure order. In ordering remedial measures, the court must take all reasonable steps to preserve the defendant's right to confrontation of witnesses and consultation with counsel.
>
> (d) If the court orders physical restraint or removal of a defendant from the courtroom, the court should enter into the record of the case the reasons therefor. Whenever physical restraint or removal of a defendant or witness occurs in the presence of jurors trying the case, the court should instruct those jurors that such restraint or removal is not to be considered in assessing the proof and determining guilt.

ABA Standards for Criminal Justice: Discovery and Trial by Jury, Standard 15-3.2 at 15-78 (3rd ed. 1996).

II. Capital sentencing trials like those in Missouri are an extension of the guilt phase of trial. Many, if not all, of the rights guaranteed to the defendant in the guilt phase extend to the defendant in the penalty phase.

A capital sentencing trial bears many of the hallmarks of the guilt-phase trial. It is, in effect, a trial on the greater offense of "murder plus one or more aggravating circumstances."[10] In Missouri, the sentencing trial starts with the presumption that the defendant shall not be sentenced to death. This presumption can be overcome only when the State has proven each element of its case for death-eligibility beyond a reasonable doubt. Among other rights, the defendant has the right to be present, the right to rebut matters considered by the jury, and the right to a fair and reliable proceeding.

In *Bullington v. Missouri*, 451 U.S. 430, 436-37 (1981), this Court considered whether the defendant's right to be free from double jeopardy was violated when the State, in a retrial, sought a death sentence after a prior jury had imposed a sentence of life without parole. The Court recognized that, like the guilt-innocence phase of the trial, a capital penalty phase in Missouri includes counsel's opening statements, the presentation of testimony and evidence, instructions to the jury, and closing arguments. *Id.* at 438 n.10. The rules of discovery and procedure apply. *Id.* at 434, 435 n.4.[11] The jury's discretion is guided by providing only two options – life without parole or

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[10] *Sattazahn v. Pennsylvania*, 537 U.S. 101, 112 (2003) (opinion of Scalia, J.). *See* note 13, *infra*.

[11] The opinion cites §565.006, RSMo 1978, which has since been amended and replaced with §565.030.4, RSMo 2000.

death – and standards are given to guide that choice. *Id.* at 438. The jury deliberates and then returns a formal punishment verdict, which must be unanimous. *Id.* at 434-35.

Most importantly, the State bears the burden of proving at least one aggravating circumstance beyond a reasonable doubt – the same standard used in the guilt phase – before the death penalty may be imposed. *Id.* at 441. The Court stressed that, by using this standard, the State recognizes that the defendant's interests are just as great in the penalty phase as in the guilt phase. *Id.*

The Court concluded that a capital penalty phase in Missouri "resemble[s] and, indeed, in all relevant respects [i]s like the immediately preceding trial on the issue of guilt or innocence. It [i]s itself a trial on the issue of punishment so precisely defined by the Missouri statutes." *Id.* at 438.[12] By enacting a procedure that so closely "resembles a trial on the issue of guilt or innocence, ... Missouri *explicitly requires* the jury to determine whether the prosecution has 'proved its case.'" *Id.* at 444 (emphasis in original). Because the defendant had been "acquitted" of the death penalty at his first trial, he could not face the death penalty upon his retrial. *Id.* at 446.[13]

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[12] *See also Monge v. California*, 524 U.S. 721, 731-32 (1998) ("The penalty phase of a capital trial is ... in many respects a continuation of the trial on guilt or innocence of capital murder."); *Caspari v. Bohlen*, 510 U.S. 383, 393 (1994), quoting *Strickland v. Washington*, 466 U.S. 668, 686-87 (1984). ("A capital sentencing proceeding ... is ... like a trial in its adversarial format and in the existence of standards for decision.").

[13] In *Arizona v. Rumsey*, 467 U.S. 203, 209 (1984), the Court extended *Bullington* to a case in which the trial court, rather than a jury, had made a finding that the State failed to establish the death-eligibility factors

(Continued on following page)

The requirement that the State must prove an aggravating circumstance beyond a reasonable doubt also implies that the defendant is presumed to be "innocent" of those circumstances until the State has proved one or more of them by evidence presented in open court.[14] And other constitutional protections follow as well. In *Specht v. Patterson*, 386 U.S. 605, 609-11 (1967), the Court confirmed that procedural safeguards attach to any hearing at which a harsher sentence may be imposed based upon "a new finding of fact ... that was not an ingredient of the

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beyond a reasonable doubt. The Court held that the "initial sentence of life imprisonment was undoubtedly an acquittal on the merits of the central issue in the proceeding – whether death was the appropriate punishment." *Id.* at 211. Of course, when no finding has been made that is tantamount to an acquittal, double jeopardy is not offended by a penalty retrial. That was the situation in *Sattazahn v. Pennsylvania*, 537 U.S. 101 (2003), involving a hung jury. *Sattazahn* reaffirmed *Bullington*'s holding that if a capital jury returns a verdict refusing to find any aggravating circumstance beyond a reasonable doubt in a jurisdiction where this is a precondition of death-eligibility, the verdict would constitute an acquittal barring retrial. Drawing together the teachings of *Bullington* and of *Ring v. Arizona*, 536 U.S. 584 (2002), Justice Scalia's *Sattazahn* opinion expresses the parallelism of a guilt-innocence trial and of a penalty trial under procedures like Missouri's by describing the two trials combined as a trial of the "offense of murder plus one or more aggravating circumstances." 537 U.S. at 111. In this regard, as well as for the reasons set forth in *Bullington* and *Rumsey*, it is altogether unlike non-capital sentencing proceedings. *See Monge*, 524 U.S. at 734, distinguishing *Bullington* in the non-capital context, where any trial-like protections stem from legislative, not constitutional, mandate.

[14] The Court has held that the presumption of innocence and the principle that the State must establish each element of a crime beyond a reasonable doubt are not logically separate and distinct. *Taylor v. Kentucky*, 436 U.S. 478 (1978). Instead, the presumption of innocence is implicit within the principle, and serves as a reminder, that the State must prove the elements beyond a reasonable doubt. *Id.* at 483, 483 n.12.

offense charged." Those safeguards include the right to be present with counsel, the right to confront witnesses, the right to cross-examine, and the right to present favorable evidence. *Id.* at 610.

The defendant is entitled to be present at his capital sentencing trial. *See, e.g., Stincer*, 482 U.S. at 745 (a defendant is entitled to "be present at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure"); *Davis v. Woodford*, 384 F.3d 628, 646 (9th Cir. 2004) (a defendant has a Sixth Amendment right to be competent at the penalty phase). As in the guilt phase, the defendant's presence is essential to allow him to communicate with counsel, assist in his defense, and have the jury observe his demeanor. *Riggins*, 504 U.S. at 142 (Kennedy, J., concurring).

As in the guilt phase, a capital defendant has a due process right to rebut any information that the jury considers and upon which it may rely in its penalty phase deliberations. In *Gardner v. Florida*, 430 U.S. 349 (1997), the trial court sentenced the defendant to death based on the contents of a presentence investigation report, portions of which were not disclosed to defense counsel. In a plurality opinion, Justice Stevens warned of the danger that erroneous or misinterpreted information could form the basis for a death sentence. *Id.* at 359. He concluded – and a majority of the Court agreed – that the defendant was denied due process because "the death sentence was

imposed, at least in part, on the basis of information which he had no opportunity to deny or explain." *Id.* at 362.[15]

So, too, in *Simmons v. South Carolina*, 512 U.S. 154, 165 (1994), the Court held that the defendant had been denied due process when the trial court refused to advise the jury that he would never be eligible for parole, after the State had argued his future dangerousness as the basis for a death sentence. The *Simmons* plurality opinion stressed that the defendant was prevented from rebutting information that the jury "considered, and upon which it may have relied, in imposing the sentence of death." *Id.* at 165. And the concurring Justices observed that by refusing the defendant the "ability to meet the State's case against him," the State had denied Simmons "one of the hallmarks of due process in our adversary system." *Id.* at 175 (O'Connor, J., concurring, joined by Rehnquist, C.J., and Kennedy, J.); *see also Kelly v. South Carolina*, 534 U.S. 246 (2002); *Shafer v. South Carolina*, 532 U.S. 36 (2001); *Ramdass v. Angelone*, 530 U.S. 156, 179 (2000) (O'Connor, J., concurring).

In the capital context, the need for reliable sentencing is paramount. The Eighth Amendment "requires provision

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[15] This rationale for the *Gardner* decision was explicitly endorsed by Justice White, 430 U.S. at 362, 364, and Justice Brennan, *id.* at 364, as well as by the plurality opinion speaking for Justices Stevens, Stewart and Powell. *And see Tuggle v. Netherland*, 516 U.S. 10, 13 (1995) (per curiam) ("The *Ake* error prevented petitioner from developing his own psychiatric evidence to rebut the Commonwealth's evidence and to enhance his defense in mitigation. As a result, the Commonwealth's psychiatric evidence went unchallenged, which may have unfairly increased its persuasiveness in the eyes of the jury."); *Skipper v. South Carolina*, 476 U.S. 1, 9-11 (1986) (Powell, J., concurring) (defendant's right to due process was violated when he was denied the ability to present evidence that he behaved well in jail awaiting trial).

of 'accurate sentencing information [as] an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die.'" *Simmons*, 512 U.S. at 172 (Souter and Stevens, J.J., concurring), quoting *Gregg v. Georgia*, 428 U.S. 153, 190 (1976). The Court has repeatedly said that "[b]ecause the death penalty is unique 'in both its severity and its finality,' . . . we have recognized an acute need for reliability in capital sentencing proceedings." *Monge*, 524 U.S. at 732. The "qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed." *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion of Burger, C.J.). As a result, it is vitally important that decisions made regarding capital sentencing "be, and appear to be, based on reason rather than caprice or emotion." *Monge*, 524 U.S. at 732, quoting *Gardner*, 430 U.S. at 358.

III. The concerns fueled by shackling in the guilt-innocence phase are implicated just as much, if not more, in capital sentencing trials.

Shackling a defendant before the jury that must decide if he lives or dies erodes the defendant's constitutional rights in the penalty phase for reasons that fall into three major categories. First, by conveying to the jurors a wide range of negative impressions about the defendant, the shackles violate the principle that the State must prove the defendant worthy of a death sentence only by evidence presented in court and not by presumptions, prejudices or suggestions that the defendant is not allowed to rebut. Second, the shackles impede all of the functions that give meaning to the defendant's right to be present at his trial – limiting his ability to communicate with counsel,

discouraging his full participation in the trial, and tainting his demeanor before the jury. Third, the shackles impair the reliability of the sentencing determination, by allowing arbitrary and unproven considerations to form the basis for a death sentence.

A. Restraints allow jurors to consider unproven, unrebuttable, and potentially false information in their assessment of whether the defendant should live or die.

The purpose of the penalty phase is to provide the jury with accurate information that permits it to make an individualized sentencing determination based on the defendant's character and record and the circumstances of the particular offense. *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976). "[P]robably the bulk of what most sentencing is all about" is a determination of the defendant's "acceptance of responsibility, repentance, character, and future dangerousness." *Mitchell v. United States*, 526 U.S. 314, 340 (1999) (Scalia, J., dissenting).

1. Future dangerousness is a crucial consideration during the jury's deliberations.

The issue of future dangerousness is a vitally important concern for capital sentencing juries. In *Jurek v. Texas*, 428 U.S. 262, 275 (1976), Justice Stevens recognized that "any sentencing authority must predict a convicted person's probable future conduct when it engages in the process of determining what punishment to impose."

Social science studies have confirmed that the defendant's future dangerousness is a crucial aspect of capital

sentencing deliberations. *See* Bowers, Sandys & Brewer, *Crossing Racial Boundaries: A Closer Look at the Roots of Racial Bias in Capital Sentencing when the Defendant is Black and the Victim is White*, 53 DePaul L. Rev. 1497, 1503 (2004) (jurors in multi-state Capital Jury Project study reported that a "great deal of discussion during punishment deliberations focused on the defendant's likely dangerousness"); Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 Colum. L. Rev. 1538, 1560 (1998) (analyzing South Carolina Capital Jury Project data and concluding "[f]uture dangerousness appears to be one of the primary determinants of capital-sentencing outcomes"); Eisenberg & Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 Cornell L.Rev. 1, 6 (1993) (South Carolina study data reveals that "[o]ther than facts about the crime, questions related to the defendant's dangerousness if ever back in society are the issues jurors discuss most. Discussion of dangerousness exceeds discussion of the defendant's criminal past, the defendant's background or upbringing, the defendant's IQ or intelligence, and the defendant's remorse or lack of it.").

2. Physically restraining a defendant in the courtroom makes the defendant an exhibit of his own future dangerousness and bad character.

Physically restraining a defendant unfairly shapes the jury's consideration of future dangerousness by communicating that the defendant remains particularly dangerous, violent, or untrustworthy. Jurors assume that the court would not impose such restraints unless it had heard evidence and found that they were warranted. They

believe that the defendant poses a genuine threat of escaping, or that he has threatened physical violence to people in the courtroom, including, perhaps, to the jurors themselves. The jurors believe that, if the defendant still has not accepted responsibility or calmed down in the years before trial, he is likely to remain dangerous if sentenced to life in prison. These beliefs become part of the body of "evidence" that the jurors incorporate in their deliberations about whether the defendant is to live or die.

Numerous courts have concluded that shackling a defendant in the penalty phase so jaundices the issue of future dangerousness as to warrant relief. In *State v. Finch*, 137 Wash.2d 792, 975 P.2d 967 (Wash.), *cert. denied*, 528 U.S. 922 (1999), the defendant wore leg restraints during his entire trial and sentencing proceedings. Additionally, one hand was cuffed to his chair and his legs were shackled to a table leg during the testimony of two of the witnesses. *Id.*, 975 P.2d at 1002. The Washington Supreme Court held that the clear error in the unjustified restraints was harmless as to the guilt phase, but not as to penalty. *Id.* at 1007-08. Even though neither side had specifically argued the issue of future dangerousness, the restraints so affected the issue that the error was not harmless. *Id.* at 1008-09. "It is undisputed that placing the defendant in restraints indicates to the jury that the defendant is viewed as a 'dangerous' and 'unmanageable' person, in the opinion of the court, who cannot be controlled, even in the presence of courtroom security." *Id.* at 1008.

In *Duckett v. Godinez*, 67 F.3d 734, 748 (9th Cir. 1995), *cert. denied*, 517 U.S. 1158 (1996), the Court of Appeals concluded that "the constitutional rules regarding shackling at trial apply equally in the sentencing context."

Although the jury knows that the defendant has been convicted of murder, "the extent to which he continues to be dangerous is a central issue the jury must decide in determining his sentence." *Id*.

> "[N]ot all convicted felons are so dangerous and violent that they must be brought to court and kept in handcuffs and leg irons." Unlike prison clothes, physical restraints may create the impression in the minds of the jury that the court believes the defendant is a particularly dangerous and violent person.

Id., quoting *Lemons v. Skidmore*, 985 F.2d 354, 357 (7th Cir. 1993).

In *Elledge v. Dugger*, 823 F.2d 1439, 1450 (11th Cir. 1987), *withdrawn in part*, 833 F.2d 250, *cert. denied*, 485 U.S. 1014 (1988), the trial court had ordered that the defendant proceed through the penalty phase in legirons. The Court of Appeals for the Eleventh Circuit recognized that "a jury might view the shackles as first hand evidence of future dangerousness and uncontrollable behavior which if unmanageable in the courtroom may also be unmanageable in prison, leaving death as a proper decision." *Id*. The court ordered penalty-phase relief on this ground. *Id*. at 1452.

In *Laird v. Horn*, 159 F.Supp.2d 58, 99-102 (E.D.Pa. 2001), the court granted habeas relief because the defendant was forced to wear handcuffs and shackles in the penalty phase. Shackling a capital defendant in the penalty phase "could . . . create[] the presumption in the minds of the jurors that petitioner was dangerous and worthy of the death sentence . . . . This risk is ever-present in a death penalty case." *Id*. at 101, citing *Commonwealth*

v. Chester, 526 Pa. 578, 601, 587 A.2d 1367, 1378-79 (Pa.), *cert. denied*, 502 U.S. 849 (1991). The error was held so prejudicial that the defendant was entitled to a new penalty phase, even though his attorney never objected to the restraints. *Laird*, 159 F.Supp.2d at 100, 102.

Federal courts have recognized the need to restrict the use of shackles and other restraints even in civil cases. Civil commitment proceedings are analogous to capital penalty proceedings in some respects, since neither formally involves a question of guilt or innocence, and both have a critical focus on whether the defendant is dangerous. In *Tyars v. Finner*, 709 F.2d 1274, 1285 (9th Cir. 1983), the court invalidated Tyars' involuntary commitment, because "[t]he likelihood of prejudice inherent in exhibiting the subject of a civil commitment hearing to the jury while bound in physical restraints, when the critical question the jury must decide is whether the individual is dangerous to himself or others, is simply too great to be countenanced without at least some prior showing of necessity." The court held that, without a showing that the restraints were necessary or that less restrictive means could not have achieved the same purpose, the circumstances "deprive[d] the . . . proceeding of the appearance of evenhanded justice which is at the core of due process." *Id*., quoting *Mayberry v. Pennsylvania*, 400 U.S. 455, 469 (1971) (Harlan, J., concurring).

Similarly, during the trial of a civil rights action brought by a prison inmate, the Seventh Circuit ruled that the inmate could not be forced to wear shackles unless extreme need were demonstrated. *Lemons*, *supra*, 985 F.2d at 357-58.

> In a civil case, the plaintiff is still entitled to a fair trial in which the jury decides the case based on admissible evidence. The shackles suggest to the jury in a civil case that the plaintiff is a violent person. Since plaintiff's tendency towards violence was at issue in this case, shackles inevitably prejudiced the jury.

Id. at 357.

3. Physical restraints lessen the State's burden of proof.

In *Estelle*, this Court held that forcing a defendant to wear jail clothing at his trial diminished the State's burden of proof by undermining the presumption of innocence. 425 U.S. at 503-504. The defendant's clothing was so likely to be a continuing influence through the trial, reminding the jurors that the defendant was in custody, that it presented an unacceptable risk of impermissible factors affecting the result. *Id.* at 504. The Court expressed the need to guard against practices that whittle away the principle that guilt is to be decided by probative evidence and beyond a reasonable doubt. *Id.* at 503.

The use of physical restraints in the penalty phase tends to water down the State's burden of proof just as the jail clothing did in *Estelle*. In the penalty phase, the jury must determine whether one or more aggravating circumstances is factually established, and the defendant is presumed to be innocent of those circumstances until the State proves them beyond a reasonable doubt. As in the trial of murder simpliciter, the defendant is entitled to have his guilt or innocence of aggravated murder determined "solely on the basis of the evidence introduced at

trial, and not on . . . other circumstances not adduced as proof at trial." *Taylor*, 436 U.S. at 485.

Under Missouri's statute, the State must establish three elements of death-eligibility before the jury may consider imposing a death sentence in its discretion. §565.030.4; *State v. Whitfield*, 107 S.W.3d 253, 258-61 (Mo.banc 2003). First, the jury must find the existence of at least one statutory aggravating circumstance beyond a reasonable doubt. §565.030.4(1). Second, the jury must determine that the "facts and circumstances" in aggravation of punishment warrant a death sentence. §565.030.4(2). Third, the jury must find that the evidence in mitigation does not outweigh the evidence in aggravation. §565.030.4(3). If the jury finds these three elements, it then proceeds to the fourth, discretionary step, deciding whether to impose a death sentence or life without parole. §565.030.4(4).

Shackling a defendant can affect the jury's deliberations on the second and third death-eligibility elements. The jury is instructed that it may consider all evidence presented at trial in assessing the "facts and circumstances" in aggravation of punishment. Missouri Approved Instructions, CR3d 313.41A, 313.44A. This includes not just the statutory aggravating circumstances, but also any facts and circumstances that the jurors find to be in aggravation of punishment. §565.030.4(2). Negative conclusions about the defendant's character and potential for future dangerousness become part of the evidence in aggravation of punishment. Thus, jurors may use the conclusions they drew from viewing the defendant in shackles as evidence in aggravation of punishment that (2) warrants death, and (3) outweighs the evidence in mitigation.

By allowing consideration of facts that were not presented as evidence in court, the use of physical restraints eases the State's burden of proof. Before one piece of evidence has been admitted or one word of testimony is given, the jurors perceive the defendant as someone who remains dangerous, violent, and untrustworthy. As with jail clothing, shackling a defendant creates "a significant danger . . . of corruption of the factfinding process through mere suspicion." *Estelle*, 425 U.S. at 518 (Brennan, J., dissenting). If the State wants the jury to consider as evidence that the defendant behaved badly in jail awaiting trial, made threats, attempted to escape, was unremorseful, or was particularly violent or dangerous, it must present that evidence in court. It must not be permitted to backdoor those inferences through the use of visible restraints.

4. Physical restraints shift the burden of proof to the defendant.

When the jurors observe the defendant in shackles, they form negative beliefs about him. The shackles become the "elephant in the room," that everyone sees but nobody discusses. The defendant is forced to choose which of two vital constitutional principles he will forego. He can stand by while the jury draws negative inferences from the shackling, and thereby have the death-eligibility elements determined under a diminished standard of proof. Or, he can shoulder the burden of proving a negative – that he has not done anything to warrant the restraints – and thereby allow the State to shift the burden of proof to him. By shifting the burden of proof to the defendant, requiring him to disprove a critical fact in dispute, the State greatly

increases the likelihood of an erroneous result. *Mullaney v. Wilbur*, 421 U.S. 684, 701 (1975).

5. Physical restraints deny the defendant the ability to rebut damaging inferences.

Because the shackles permit inferences that are not based upon evidence, the defendant cannot confront, cross-examine, or rebut those inferences. The shackles generate negative conclusions about the defendant – that he is inherently dangerous or violent; that he is likely to escape; or that he has threatened people in the courtroom, including even the jurors themselves. Yet there is no witness to cross-examine, because the State has not presented the testimony of any witness. There is no document to refute, because the State has not presented any documentation.

This Court has reversed death sentences when those sentences were based on matters that had not been disclosed to defense counsel, *Gardner*, 430 U.S. 349, and when the defendant was not allowed to rebut the State's argument of the defendant's future dangerousness, *Simmons*, 512 U.S. 154. Shackling presents the same danger because it generates negative conclusions about the defendant that the jurors will consider in their deliberations. Yet, as in *Simmons*, the defendant does not have the chance to refute that information, and, as in *Gardner*, the sentencer may base its death sentence on erroneous or misinterpreted information.

B. Physical restraints limit the procedural protections which are supposed to be secured by the defendant's right to be present at trial and to participate in the proceedings.

One of the benefits secured to the defendant by the right to be present in the courtroom is the opportunity to be observed by the jury. In the penalty phase, the defendant needs to show his humanity, that he is not a mad dog that needs to be put down for everyone's safety. He needs to show that he is not so different from the jurors and is someone to whom the jurors can relate and to whom they should extend mercy. Parading the defendant before the jury in chains, as a dangerous animal, defeats this goal as much as would presenting him in a cage.

By shackling a defendant, the State uses the defendant's presence at trial against him. The State manipulates the evidence, creating a prejudicial negative demeanor, making the defendant appear dangerous and volatile, even though he is not. As Justice Kennedy has recognized:

> The prejudice can be acute during the sentencing phase of the proceedings, when the sentencer must attempt to know the heart and mind of the offender and judge his character, his contrition or its absence, and his future dangerousness. In a capital sentencing proceeding, assessments of character and remorse may carry great weight and, perhaps, be determinative of whether the offender lives or dies.

Riggins, 504 U.S. at 144 (concurring opinion).

From the moment the defendant first appears, handcuffed and shackled, before the penalty phase jury, the jury draws inferences from his restraints. Realizing this, some defendants may relinquish altogether their right to be present, rather than be presented in such a negative fashion. A defendant may decide that it is preferable for the jury not to observe him at all, rather than to view him in full restraints, with all the trappings of a dangerous and violent man.

Alternatively, shackling may discourage the defendant from testifying. A shackled defendant may decide not to testify, lest he be forced to shuffle to the witness stand in handcuffs and legirons, chains jangling, in full view of the jury.

Shackling also impedes the defendant's ability to communicate with counsel. This Court recognized that "one of the defendant's primary advantages of being present at the trial, his ability to communicate with his counsel, is greatly reduced when the defendant is in a condition of total physical restraint." *Allen*, 397 U.S. at 344. Physical restraints may also distract and physically irritate the defendant, making him unable to concentrate fully on the evidence presented. Handcuffed, he can not take notes or write notes to his attorney. The jury thus may believe he is disinterested in his own fate, when actually, he is trying to minimize the jury's view of the restraints.

C. Shackling a defendant in the penalty phase leads to arbitrary sentence determinations.

Shackling a defendant before the jury that will decide if he lives or dies results in an arbitrary sentencing determination. Because the jury infers from the shackles facts that have not been proven in court and are not subject to cross-examination or refutation, a significant risk emerges that the jury will base its determination of sentence on inaccurate information. "Accurate sentencing information is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die." *Gregg*, *supra*, 428 U.S. at 190 (joint opinion of Stewart, Powell, and Stevens, JJ.). By misleading the jury, shackles create an unacceptable risk that the death sentence will be imposed arbitrarily or capriciously, or by whim or mistake. *See Caldwell v. Mississippi*, 472 U.S. 320, 343 (1985) (O'Connor, J., concurring).

IV. The procedures and conditions established as prerequisites to shackling in *Estelle*, *Allen* and *Holbrook* are required in the penalty phase of a capital case, no less than in the guilt phase.

Certain practices pose such a threat to the "fairness of the factfinding process" and fundamental rights that they must be subjected to "close judicial scrutiny." *Holbrook*, 475 U.S. at 568, quoting *Estelle*, 425 U.S. at 504. Shackling a defendant – in either the guilt phase or the penalty phase – is such a practice. Just as shackling in the guilt phase erodes the presumption of innocence by making the defendant appear guilty, shackling in the penalty phase tilts the scales toward death by making the defendant

appear especially dangerous, even years after his crime, and even in the confines of the courtroom. Shackling diverts the jurors' attention from trial-tested evidence to matters that the defense has not been able to confront or refute. It allows a death sentence based on suspicions and false assumptions and offends the heightened standard of reliability that this Court has repeatedly demanded in capital sentencing proceedings. *See*, *e.g.*, *Gardner,* 430 U.S. at 357-58; *Monge,* 524 U.S. at 732.

Because shackling a defendant in the penalty phase endangers so many vital constitutional rights, the same standards and procedures that the Court has established for guilt-phase shackling are indispensable in the penalty phase as well. Shackling violates the Constitution unless a properly supported finding is made on the record, after due inquiry, that (1) there is a need to shackle the defendant to further an essential state interest specific to the case at bar; and (2) lesser measures would not suffice to protect that essential state interest. *Allen*, 397 U.S. at 344; *Estelle*, 425 U.S. at 505; *Holbrook*, 475 U.S. at 568-69. This standard is easy to apply, effectively balances the interests of the State while protecting the constitutionally guaranteed rights of the defendant, and is already in use by many courts in the penalty phase.

V. The unjustified use of physical restraints violated Deck's constitutional rights, and thus, the State must demonstrate that the error was harmless beyond a reasonable doubt.

A. The trial court violated Deck's rights by needlessly imposing physical restraints and by failing to take any remedial action to reduce the prejudicial effect of the restraints.

In the circumstances of this case, there was no justification for shackling Deck with legirons and handcuffs. The only reason the trial court gave for shackling Deck was that Deck had been convicted (J.A.58). If that were sufficient, every defendant in every capital penalty phase would be shackled and handcuffed. That cannot possibly be the rule of the Constitution.

> The mere fact that a jury convicted a defendant of first degree murder is not a sufficient basis for a decision to shackle him during the penalty phase. The trial court should look at the particular facts of the case and the conduct of the proceedings and should balance the need for safety and security in the courtroom against the potential for prejudice.

State v. Young, 853 P.2d 327, 350-51 (Utah 1993). *See also Lovell v. State*, 347 Md. 623, 648, 702 A.2d 261, 273 (Md. 1997) ("Murder is intrinsically a most violent crime, but, if that alone justified shackling at a capital sentencing, then all murderers could be shackled when sentenced by a jury. That is not the way in which the Due Process Clause applies."); *Bello v. State*, 547 So.2d 914, 918 (Fla. 1989) (remanding for a new penalty phase because court failed

to make a record as to why shackles were necessary; conviction itself was not sufficient).

Not only did the court give no other reason than Deck's conviction for the decision to restrain Deck, but none existed. Deck caused no disturbances at his first trial, at the hearing on his motion for postconviction relief, or at the penalty phase retrial. He made no threats of violence. Deck's prior convictions involved only non-violent crimes (J.A.59-62).

Any escape attempt by Deck was remote in time, rather half-hearted, and did not involve violence. Seven years prior to his retrial, in his first months in jail, Deck was suicidal and allegedly removed some caulking from his jail cell window (PCR Ex.66, Surratt Depo.). He underwent a mental health evaluation, but no charges were filed, and no evidence was presented about the incident (J.A.3). In 1985, about seventeen years prior to the retrial, Deck had aided an escape by two other inmates – he obtained a sawblade and helped the other inmates saw through their bars, but he himself did not attempt to escape (J.A.62-63).

Even if some form of restraint were justified, the court's order that Deck appear throughout the penalty retrial in legirons and handcuffed to a bellychain was manifestly excessive and disregarded the principle that shackles be employed only as a last resort. At his initial trial, the court had required Deck to appear in leg braces, which are worn under the clothing (J.A.5). The leg braces obviously sufficed, because the trial proceeded without incident. The court had no need to impose even more severe restraints after Deck had behaved properly at his first trial with minimal restraints. Much less severe

measures would have satisfied the State's interest in security, without subjecting Deck to the prejudicial effects of the visible restraints.

Furthermore, the court failed to take any measures to reduce those prejudicial effects. Counsel filed a lengthy motion that proposed alternatives to the use of shackles, such as placing additional guards in the courtroom (J.A.41-56). Counsel gave examples of ways that other trial judges in Missouri, while using restraints, had undertaken to ensure that the jury could not see the restraints (J.A.48-50). But the court made no effort to alleviate the prejudice in Deck's case by following counsel's suggestions – placing boxes around the defense table so the legirons could not be seen; ensuring that Deck was not paraded before the jury in his restraints; and using restraints that would not rattle or be seen easily (J.A.48-50). Instead the court overruled defense counsel's motion in its entirety, content that the shackles were displayed to the jury on the theory that Deck's "being shackled takes any fear out of [the jurors'] minds" (J.A.56, 59).

B. The *Chapman* standard should govern a State's claim of harmless error when a defendant has been unconstitutionally shackled during a capital sentencing trial.

Chapman v. California requires that, before a federal constitutional error can be held harmless, the State must prove "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." 386 U.S. at 24. The *Chapman* standard is applicable here because shackling a defendant is an inherently prejudicial practice, violating several of the defendant's constitutional rights, yet its effects are subtle and not easily quantifiable.

The restraints send a message to the jury which may influence the jurors' deliberations without their even being fully cognizant of it.

In the penalty phase, the prejudice resulting from shackling is even harder to quantify than it is in the guilt-innocence phase. The jury's deliberations are more subjective than in guilt phase – concerned with character, remorse, and future dangerousness – rather than such objective facts as whether the defendant committed the acts charged. *Finch*, 975 P.2d at 1007-1008. As a result, "[u]nlike the guilt phase, the prejudice to the Defendant during a special sentencing proceeding cannot necessarily be overcome by objective and overwhelming evidence." *Id.* The question therefore must be that posed in cases like *Estelle* and *Riggins*, *supra*: whether the court-imposed practice presents an unacceptable risk that impermissible factors will affect the verdict. *See Estelle*, 425 U.S. at 504. The burden is on the State to show beyond a reasonable doubt that such a risk does not exist. It would be fundamentally unfair to require the defendant whose rights have been violated to pinpoint precisely how this unquantifiable prejudice affected his trial.

The Court most recently acknowledged this point in *Riggins*. There, it refused to require the forcibly medicated defendant to prove actual prejudice, noting that efforts to do so would be futile and "purely speculative." 504 U.S. at 137. Justice O'Connor, writing for the Court, held that "[l]ike the consequences of compelling a defendant to wear prison clothing, [citing *Estelle*, *supra*, 425 U.S. at 504-505], or of binding and gagging an accused during trial, [citing *Allen*, *supra*, 397 U.S. at 344], the precise consequences of forcing antipsychotic medication upon Riggins cannot be shown from a trial transcript." *Id.*

C. The State cannot prove that the error was harmless.

To determine the likely effects of a particular procedure, courts must rely on "reason, principle, and common human experience." *Estelle*, 425 U.S. at 504. Applying these factors, the State cannot show that Deck's legirons and handcuffs had no place in any juror's deliberations.

1. The restraints were visible.

The physical restraints imposed upon Carman Deck cannot be considered harmless beyond a reasonable doubt. Deck was handcuffed to a belly chain and wore legirons throughout his capital sentencing trial (J.A.57-59). Numerous times, the jury clearly saw Deck – chained, handcuffed and shackled – paraded in and out of the courtroom or standing when the judge and jury entered or left the courtroom (J.A.69). This is not a case in which shackling can be deemed harmless because it was inconspicuous.

2. Shackling could have made a difference in the outcome of this close case.

This was a close case, where the shackling could have made a difference. *See Dyas v. Poole*, 317 F.3d 934, 937 (9th Cir.), *cert. denied*, 540 U.S. 937 (2003) ("Because the case was close, an otherwise marginal bias created by the shackles may have played a significant role in the jury's decision."). Deck presented a compelling mitigation case, putting into play the possibility of a life without parole sentence. The Missouri Supreme Court itself acknowledged that, in the first penalty phase, Deck presented "substantial mitigating evidence" of his "horribly abusive

childhood." *Deck v. State*, 68 S.W.3d 418, 422 (Mo.banc 2002).

The evidence presented in this second penalty trial was no less substantial. From infancy, Deck was alternately abused and abandoned by his mother, who preferred running around with other men to caring for Deck and his sisters and brother (Tr.467,483-86,497). Deck shouldered the role of parent and did his best to clothe, clean, and feed his three younger siblings (Tr.485-87). Usually left without food, Deck scavenged or stole to feed them, even if it was just a stick of butter or dry dog food (Tr.487,506). Abandoned by their mother, the children were shipped from relative to relative (Tr.468-69,490-91). Deck lived with an alcoholic stepmother, who repeatedly abused him, including smearing feces on his face, making him keep it there until it dried, photographing him, and taunting him that she would tell others what he had done (Tr.493-94; M.D. Depo. 12-14).

Although Deck eventually was placed in foster homes, he was given back to his mother at her whim, only to have her abandon him again (Tr.491). When he finally found a foster family that gave him love, structure and stability, and wanted to adopt him, Deck again was abruptly removed, despite his protestations that making him leave was "killing me on the inside" (Tr.526-30).

When Deck was finally reunited with his siblings, they enjoyed being together (M.D.Depo.16). Deck showered his baby niece with attention and presents, showing her the love that he never received (M.D.Depo.17). His brother loves him and visited him in prison (M.D.Depo.16,26-27).

As evidence in aggravation of punishment, the State presented the facts of the crime; Deck's prior convictions

for burglary, stealing and aiding an escape (J.A.59-62); and victim impact testimony by several members of the victims' family (Tr.387-400,410-21).

3. Deck's future dangerousness was in issue.

Future dangerousness is often a subject that worries jurors in capital sentencing deliberations, and it was specifically in issue here. The State made it an issue by presenting Deck as an "exhibit" of his own bad character and future dangerousness by forcing him to appear before the jury in legirons and handcuffed to a belly chain. The defense futilely tried to counter that "evidence" by arguing in closing that Deck would do well in the structured environment of prison and would never hurt anyone else (Tr.555,558). Seven years had passed from the date of the crime to the penalty phase retrial. By presenting Deck to the jury in visible handcuffs and shackles, the court communicated to the jury that, even after so much time had passed, Deck was still dangerous, warranting these extreme measures. The restraints communicated that Deck had not yet adjusted, and therefore likely would never adjust, to a life in prison.

4. *Voir dire* questioning did not alleviate the harm.

The State cannot claim that defense counsel's questioning of the venire resolves the issue. Referring to the shackles, counsel suggested, "I guess that's what happens when you get convicted" and asked if that would sway anyone to render one sentence or another (J.A.58). By

raising their hands, the jurors agreed that the chains would not affect them (J.A.58).

This Court has rejected the notion that, merely because jurors state during *voir dire* that they would not be influenced by a procedure in the courtroom, the defendant could not have suffered prejudice. *Holbrook*, 475 U.S. at 565, 570. The Court acknowledged that "[i]f 'a procedure employed by the State involves such a probability that prejudice will result that it is deemed inherently lacking in due process,' *Estes v. Texas*, 381 U.S. 532, 542-43 (1965), little stock need be placed in jurors' claims to the contrary." *Holbrook*, 475 U.S. at 570, citing *Sheppard v. Maxwell*, 384 U.S. 333, 351-52 (1966); *Irvin v. Dowd*, 366 U.S. 717, 728 (1961). "Even though a practice may be inherently prejudicial, jurors will not necessarily be fully conscious of the effect it will have on their attitude toward the accused." *Holbrook*, 475 U.S. at 570. The relevant question is not "whether jurors actually articulated a consciousness of some prejudicial effect, but rather, whether 'an unacceptable risk is presented of impermissible factors coming into play.'" *Id.*, citing *Estelle*, 425 U.S. at 505; *see also Dyas*, 317 F.3d at 937-38; *Kirk v. Raymark Industries, Inc.*, 61 F.3d 147, 153 (3rd Cir. 1995), *cert. denied*, 516 U.S. 1145 (1996) (district court should not rely simply on the jurors' subjective assessments of their own impartiality).

Defense counsel's attempt to alleviate the prejudice did not cure the court-created error. Reversal has been warranted even when the trial court instructed the jury to disregard handcuffs and legirons. In *Lovell*, *supra*, 347 Md. at 649 n.6, 702 A.2d at 274 n.6, the trial court instructed the jury that the capital defendant's handcuffs and legirons were part of the normal procedure for anyone

convicted of murder and facing a lengthy sentence. It instructed the jury, "to draw no conclusions regarding future dangerousness or any other conclusions based upon these normal security measures." *Id.*, n.6. The appellate court reversed, holding, "[w]e do not believe that this instruction cures the error by causing the balance to tip sufficiently away from prejudice and in favor of the State interest in courtroom security to sustain the decision to shackle." *Id.*

Presenting Deck to the jury while in legirons and handcuffed to a belly chain throughout the sentencing trial, without justification, stripped the proceedings of the heightened degree of reliability that is so essential to capital sentencing trials. Under *Chapman*, it cannot be found beyond a reasonable doubt that the risk of prejudice from this unwarranted procedure did not materialize, and Carman Deck must receive a new sentencing trial.

CONCLUSION

The judgment of the Supreme Court of Missouri should be reversed.

Respectfully submitted,

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APPENDIX

Revised Missouri Statutes (2000), §565.030.4:

If the trier at the first stage of a trial where the death penalty was not waived finds the defendant guilty of murder in the first degree, a second stage of the trial shall proceed at which the only issue shall be the punishment to be assessed and declared. Evidence in aggravation and mitigation of punishment, including but not limited to evidence supporting any of the aggravating or mitigating circumstances listed in subsection 2 or 3 of section 565.032, may be presented subject to the rules of evidence at criminal trials. Such evidence may include, within the discretion of the court, evidence concerning the murder victim and the impact of the crime upon the family of the victim and others. Rebuttal and surrebuttal evidence may be presented. The state shall be the first to proceed. If the trier is a jury it shall be instructed on the law. The attorneys may then argue the issue of punishment to the jury, and the state shall have the right to open and close the argument. The trier shall assess and declare the punishment at life imprisonment without eligibility for probation, parole, or release except by act of the governor:

(1) If the trier does not find beyond a reasonable doubt at least one of the statutory aggravating circumstances set out in subsection 2 of section 565.032; or

(2) If the trier does not find that the evidence in aggravation of punishment, including but not limited to evidence supporting the statutory aggravating circumstances listed in subsection 2 of section 565.032, warrants imposing the death sentence; or

(3) If the trier concludes that there is evidence in mitigation of punishment, including but not limited to evidence supporting the statutory mitigating circumstances listed in subsection 3 of section 565.032, which is sufficient to outweigh the evidence in aggravation of punishment found by the trier; or

(4) If the trier decides under all of the circumstances not to assess and declare the punishment at death.

If the trier is a jury it shall be so instructed. If the trier assesses and declares the punishment at death it shall, in its findings or verdict, set out in writing the aggravating circumstance or circumstances listed in subsection 2 of section 565.032 which it found beyond a reasonable doubt. If the trier is a jury it shall be instructed before the case is submitted that if it is unable to decide or agree upon the punishment the court shall assess and declare the punishment at life imprisonment without eligibility for probation, parole, or release except by act of the governor or death. The court shall follow the same procedure as set out in this section whenever it is required to determine punishment for murder in the first degree.

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No. 04-5293

In the
SUPREME COURT OF THE UNITED STATES
October Term, 2004

CARMAN L. DECK,
Petitioner,

v.

STATE OF MISSOURI,
Respondent.

On Writ of Certiorari
to the Supreme Court of Missouri

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Is restraining a defendant during a capital penalty phase proceeding, held after the guilty verdict was affirmed but the penalty reversed and remanded, constitutionally unfair regardless of the circumstances?

If restraining a defendant during a new capital penalty phase is not constitutionally unfair regardless of the circumstances, what burden does the defendant bear to show that it would be constitutionally unfair in the circumstances of his penalty-phase retrial?

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No. 04-5293

In the
SUPREME COURT OF THE UNITED STATES

CARMAN L. DECK,
Petitioner,

v.

STATE OF MISSOURI,
Respondent.

On Writ of Certiorari
to the Supreme Court of Missouri

BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

Petitioner Carman Deck was convicted of two counts of first-degree murder and received two death sentences for killing an elderly couple during a home-invasion robbery. The Missouri Supreme Court upheld Deck's convictions and sentences on direct appeal, but in a separate appeal involving Deck's motion for post-conviction relief, it set aside the death sentences and remanded the case for a new penalty phase. In the penalty-phase retrial, during which Deck was restrained in "leg irons" and a "belly chain," a jury again declared that he should receive two death sentences. On appeal, the Missouri Supreme Court upheld the death sentences and rejected Deck's claim that the restraints violated his constitutional rights.

The Murders. In its original direct appeal opinion affirming Deck's convictions and previous death sentences, the Missouri Supreme Court described the murders that Deck committed (Joint Appendix ("J.A.") 6-8). The facts described in that opinion, with pertinent additions appearing in the transcripts from the first trial and the penalty-phase retrial, are as follows:

In June 1996, Deck and his mother's boyfriend concocted a plan to obtain money that the boyfriend needed for a trip to Oklahoma. Deck planned to steal the money from James and Zelma Long, who lived in DeSoto, Missouri. Deck chose the Longs because some thirteen years earlier, he had entered the Longs' house with their grandson, who then stole money from his grandparents' safe. Deck planned to break into the Longs' house on a Sunday, while they were at church, and take money from their safe.

Deck and his mother's boyfriend made several trips to DeSoto to canvass the area. Deck bragged to a woman he met that he knew some people with money and that he was prepared to do "anything it took" to get it (1st Tr. 603-04). But several Sundays passed without Deck carrying out his plan (1st Tr. 763). On Monday, July 8, 1996, the boyfriend told Deck that he and Deck's mother wanted to leave for Oklahoma the following Friday. The boyfriend then gave Deck his .22 caliber automatic pistol.

That evening, Deck and his sister left her St. Louis County apartment and drove to rural Jefferson County, near DeSoto, where they parked on a back road and waited for dark. At nine o'clock, they drove closer to the Longs' house and pulled in the driveway.

Deck and his sister knocked on the door. When Zelma Long answered, they asked her for directions. Mrs. Long

invited them into the house and explained the directions to them while Mr. Long wrote them down. As Deck walked toward the front door to leave, he pulled the pistol from his waistband, pointed it at the Longs, and ordered them to lie face down on their bed. They complied without a struggle and pleaded with Deck not to hurt them.

Deck ordered Mr. Long to open the safe, but Mrs. Long, who knew the combination, opened the safe and took out papers and jewelry. She also told Deck that she had $200 in her purse; Deck sent Mrs. Long to the kitchen to get that money. Mr. Long told Deck that there was about $200 in a decorative canister on top of the television set, and Deck took that also. Still hoping to avoid harm, Mr. Long even offered to write Deck a check. Later, in referring to this offer during his confession to police, Deck said, "That's just how nice he was" (Tr. 443; 1st Tr. 765).

Deck then ordered the Longs to get on the bed and lie on their stomachs with their faces to the side. Deck stood at the foot of the Longs' bed for ten minutes deciding what to do with them. Deck was convinced that the Longs had recognized him (Tr. 442). He said later that he thought, "If I leave 'em, I'm fucked. If I shoot 'em, I'm fucked" (Tr. 443; 1st Tr. 766). As he stood there, the Longs begged him to take anything he wanted, saying to him, "just don't hurt us." Deck's sister, who had been watching at the front door, came down the hallway, told Deck that it was time to leave, and then ran out to the car.

Deck placed the gun on James Long's head and shot him twice. Deck then either reached across or walked around the bed, put the gun on Zelma Long's head, and shot her twice. The Longs died from the gunshots.

Deck grabbed the money and left. On the drive back, Deck's sister complained of stomach pains and Deck dropped

her off at a hospital. He gave his sister about $250 of the Longs' money, kept the quarters in the decorative cannister, and drove to his sister's apartment in St. Louis County.

Arrest and Initial Trial. St. Louis County Police arrested Deck in the parking lot of his sister's apartment complex. Inside the car, police found the murder weapon and the decorative tin filled with quarters. Deck was also wearing a "fanny pack" containing $242 in cash.

Deck was read his rights and agreed to speak with detectives from the Jefferson County Sheriff's Department (Tr. 429-30; 1st Tr. 743-745). At first, Deck said that he and his sister had been in Jefferson County looking for cars to buy (Tr. 431; 1st Tr. 748). Later, Deck changed his story and said that he and his sister had followed his mother's boyfriend to DeSoto, that they parked on a back road, and that fifteen minutes later the boyfriend returned and handed Deck the .22 caliber pistol and the canister full of coins through the car window (Tr. 432-33; 1st Tr. 752-53). After being informed that his mother's boyfriend had an alibi, Deck finally admitted that he committed the murders, and he made a tape-recorded confession (Tr. 435-36, 438-43; 1st Tr. 761-66, 769).

In February 1998, Deck was brought to trial before a jury in Jefferson County Circuit Court, with Judge Gary P. Kramer presiding. The jury found Deck guilty of two counts of first-degree murder, two counts of armed criminal action, and one count each of first-degree robbery and first-degree burglary. After the penalty phase, the jury returned a verdict finding the existence of all the statutory aggravating circumstances presented to it and declaring that Deck be given a death sentence for each murder. The Missouri Supreme Court affirmed Deck's convictions and sentences on direct appeal (J.A. 6-39).

Throughout his first trial, and without objection, Deck was allowed to wear civilian clothes, but was restrained by a leg brace (J.A. 5).

Post-Conviction Proceedings. Deck filed a motion for post-conviction relief, alleging that he received ineffective assistance of counsel. Judge Kramer heard evidence that Deck had been on a suicide watch before his first trial and had to be evaluated concerning his competency to stand trial (J.A. 3-4; PCR Tr. 153-54).[1] The psychologist's competency report mentioned allegations by jail personnel, which Deck denied, that Deck had "attempted to escape by loosening window caulking and attempted to injure himself by hitting his head against the cell wall" (Surratt Dep., Ex. 66). Other evidence suggested that Deck had been raped in prison and that he had a "low frustration level" and had "acted out" while incarcerated (PCR Tr. 153-54, 222-23, 224; Cummings Dep. 85-88; Tesreau Dep. 17-18). Judge Kramer overruled Deck's motion.

On appeal, the Missouri Supreme Court affirmed the denial of post-conviction relief as to the guilt phase, but it reversed the denial of relief as to the penalty phase. *See Deck v. State*, 68 S.W.3d 418, 422 (Mo. 2002). Holding that Deck received ineffective assistance of counsel during the penalty phase because counsel failed to object to faulty jury instructions, the court set aside Deck's death sentences and remanded the case for a retrial of the penalty phase. *Id.* at 429-31.

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[1] Both parties have requested permission to lodge with this Court relevant testimony and evidence admitted during the hearing on Deck's motion for post-conviction relief and the Missouri Supreme Court's opinion in the appeal involving that motion. The transcript from the hearing is referred to as "PCR Tr.," and the deposition testimony admitted into evidence is referred to by the deponent's last name.

Penalty-Phase Retrial. Before the penalty-phase retrial, Judge Kramer ordered that Deck be allowed "to dress in court clothes for trial" (J.A. 40). But Judge Kramer denied Deck's motion to appear at trial free from restraints (J.A. 41-56).

After Judge Kramer conducted individualized voir dire in chambers over hardship and publicity issues, Deck's counsel returned to the restraint issue, noting, "Carman is actually in leg-irons and hand chains and the defense objects to that. We think that it is unduly–it prejudices him towards the jury and makes him look dangerous" (J.A. 57-58; Tr. 74). The trial court overruled the objection: "He has been convicted and will remain in legirons and a belly chain" (J.A. 58; Tr. 74).

The matter then proceeded before the jury–but the record as to whether, when, and what the jury could see of Deck's restraints is minimal.

During voir dire, Deck's counsel directed the potential jurors' attention to Deck's restraints. He asked the venire panel whether anyone would be affected by them:

> The other thing about [Deck] that you all either do or will know is that there's chains on him. I guess that's what happens when you get convicted, but I don't want anybody to think anything or to make it more likely that you're gonna render one sentence or another. Is that gonna affect anyone in any way? Let me ask it this way. Everybody over here, can you guarantee me the fact that–I mean he's shackled, his hands, it's not gonna affect you one way or another in the ultimate verdict? Can I see a sign of hands that everybody would agree that it's not gonna affect them whatsoever, yes, it's not

> going to? Over here, would everybody agree? Is there anyone that it would affect?

(J.A. 58). No one indicated that the restraints would have any effect.

At the conclusion of voir dire, Deck's counsel renewed his objection to the restraints, this time in a motion to strike the entire venire panel because Deck had been "shackled" (J.A. 58). Counsel argued that the restraints made the panel "think that [Deck] is . . . violent today" and might "do something in the courtroom or do something to them and it puts fear in their minds, which is not appropriate for someone who's gonna [sic] decide the penalty in this case" (J.A. 58-59). In overruling the objection, Judge Kramer stated that Deck "being shackled takes any fear out of their minds" (J.A. 59).

Nowhere else in the record is there mention of restraints; Deck's additional description of the restraints and their visibility consists of untested, post hoc allegations. There was opportunity during the proceeding to mention the restraints, if they were indeed noticeable. For example, during the penalty phase, numerous witnesses identified Deck in front of the jury. They could have referred to him as the person who was shackled. Instead, they all used descriptive phrases relating largely to Deck's clothing: Deck was "seated at this table over here with the green shirt on" (Tr. 303); "sitting at the Defendant's table in the green shirt with the black stripes" (Tr. 308); "sitting at the defense table in the green pullover shirt" (Tr. 347); and "sitting over there in kind of a brown striped shirt" (Tr. 429).

The only on-the-record reason Judge Kramer gave for restraining Deck during the penalty phase retrial was the fact that Deck had already been convicted (J.A. 58). But he had other information; not only had he presided over Deck's first

trial, he had also conducted the post-conviction hearing during which evidence was taken and witnesses were heard. As noted above, Judge Kramer heard evidence of Deck's mental condition, dangerousness, and potential for escape.

During the penalty-phase retrial, the State presented several witnesses and exhibits from the guilt phase of Deck's first trial to acquaint the new jury with the nature of the murders of which Deck had been convicted. The State also presented evidence of Deck's numerous burglary and stealing convictions from 1985 until 1993 (J.A. 59-62), including a 1985 conviction for aiding an escape in which Deck procured a saw blade and assisted in cutting jail bars to help two prisoners escape (J.A. 61, 63).

During closing argument, the prosecutor focused nearly exclusively on the nature of the murders Deck committed (Tr. 545-53, 559-63). Deck's counsel argued, on the other hand, that the jury should not impose a death sentence because of Deck's difficult childhood and the fact that a sentence of life without the possibility of parole meant that Deck would never get out of prison. He told the jury: "A life verdict mean[s] he'd never walk the street. He will go to prison. He will never be free" (Tr. 555), and, "[h]e will be in prison for the rest of his life" (Tr. 558).

The jury found all six statutory aggravating circumstances presented to it on both counts of first-degree murder: (1) that the murders were each committed while Deck was engaged in the commission of another unlawful homicide; (2) that Deck murdered each victim for the purpose of receiving money or any other thing of monetary value; (3) that both murders involved depravity of mind; (4) that each murder was committed for the purpose of avoiding a lawful arrest; (5) that each murder was committed while Deck was engaged in the perpetration of burglary; and (6) that each murder was

committed while Deck was engaged in the perpetration of robbery (J.A. 65-67).[2] The jury returned a verdict declaring that Deck should receive two death sentences (J.A. 2; L.F. 231, 234).

Post-trial motions and sentencing. Before sentencing, Deck filed a motion for a sentence of life without probation or parole or for a new penalty phase trial (J.A. 68-69). There, Deck began to add allegations to the minimal record regarding restraints. Deck urged that his pre-trial motion to appear free of restraints should have been granted "for the reasons stated in the motion and on the record at the time of the hearing on the matter" (J.A. 68). Deck then alleged that during an off-the-record pretrial discussion, Judge Kramer indicated that Deck could wear his own clothes to court, but that he would be restrained by a leg brace under those clothes for security purposes (J.A. 68). According to Deck, the judge changed this ruling on the morning of trial when he ordered Deck to be "shackled and handcuffed (with a belly chain) throughout the entirety of the trial" (J.A. 68-69). Deck's motion made no specific mention of "leg irons." Deck's allegations continued, adding description that has never been verified or tested:

> During the trial there were numerous times when the jury saw Mr. Deck paraded in and out of the courtroom or standing when the judge and jury entered or left the room with his chains, handcuffs and shackles clearly within view of both the voir dire panels and the actual jury who decided his fate.

(J.A. 69).

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[2] The jury in Deck's first trial found identical statutory aggravating circumstances (J.A. 37).

Later, at the sentencing hearing, Deck's counsel noted that a motion for a life sentence or new trial had been filed and indicated that Deck would stand on the motion without offering argument or evidence (Tr. 565). After Judge Kramer overruled the motion, Deck read a statement in open court professing his innocence (Tr. 565-68). Judge Kramer then imposed the two death sentences recommended by the jury (J.A. 2; Tr. 565, 570-71; L.F. 257-58).

Appeal from the Penalty-Phase Retrial. On appeal, the Missouri Supreme Court affirmed Deck's death sentences (J.A. 70-84). In resolving Deck's claim that his constitutional rights were violated by the restraints imposed during the retrial, the court noted that a trial court's decision "to impose security by use of restraints is an individual and fact-specific inquiry" (J.A. 72). In holding that Deck had failed to show that his constitutional rights had been violated, the court found that Deck had "made no record of the extent of the jury's awareness of the restraints throughout the penalty phase," that Deck had not claimed "that the restraints impeded him from participating in the proceedings," and that Deck was a "repeat offender" and that the evidence showed that "he killed his two victims to avoid being returned to custody" (J.A. 72-73).

In addition, the court found that Deck offered "nothing more than speculation" that the outcome of his trial had been prejudiced (J.A. 73). The court rejected the notion that simply being viewed in shackles is, by itself, proof of prejudice, and pointed out that Deck's failure to prove prejudice was reinforced by the venire panel's response during voir dire that seeing Deck in restraints would not affect their decision (J.A. 73).

SUMMARY OF ARGUMENT

Restraining a defendant during trial may be required in certain circumstances. Those circumstances include factors relating to the defendant and those relating to the courtroom and the need to maintain the safety of the trial participants, court personnel, and spectators. This Court's decisions in *Illinois v. Allen*, 397 U.S. 337 (1970), *Estelle v. Williams*, 425 U.S. 501 (1976), and *Holbrook v. Flynn*, 475 U.S. 560 (1986), confirm that security measures may be necessary and that the question of what measures to use when must largely be left to the trial judge. But they also suggest that the use of visible security measures, including visible restraints, during a guilt-phase trial can adversely impact the presumption of innocence.

This Court's precedents do not, however, extend that presumption to the context of a penalty phase, particularly a penalty-phase retrial. To suggest that Deck's jurors were or should have been presuming him to be innocent ignores not only precedent flatly to the contrary, but also the fact that Deck's jury knew that they were there only to decide his sentence, and that his guilt had already been determined. The presumption of innocence necessarily falls out of any consideration of the use of restraints in penalty phase.

Of course, the penalty phase raises new concerns, not present in guilt phase, about reliability of sentencing. This Court's Eighth Amendment and Due Process Clause cases establish that reliability can be compromised when the sentencer is misled in some fashion, either affirmatively or by omission. In such circumstances, the defendant in a capital sentencing proceeding has the right to present evidence, argument, or instruction to rebut any incorrect or incomplete evidence that the State has presented with evidence of his own, consistent with the general rule of capital sentencing proceedings that the defendant be permitted to present any relevant,

accurate evidence in mitigation that might provide the jury with a reason to give a sentence less than death.

But, in Deck's case, restraints were not misleading. Deck is a twice-convicted murderer; by definition, he is dangerous. Further, penalty-phase restraints convey at most a mixed message: they are as likely to suggest that a defendant is being and can continue to be restrained as they are to suggest that incarceration could be insufficient. If a restrained defendant, like Deck, can behave appropriately in court while restrained, jurors may decide that the defendant will do well in, and benefit from, a similarly structured prison environment. To the extent that restraints may suggest future dangerousness to other inmates, that suggestion can hardly be countenanced, particularly on Deck's facts, because the State never argued or injected the issue of future dangerousness. In fact, in his argument, Deck all but admitted his own dangerousness in an attempt to convince jurors that his dangerousness could be contained through lifetime incarceration.

The record in Deck's case is simply too thin to support the conclusion that his sentencing was unreliable or otherwise improper. Deck urges unreliability based upon mere allegations in a motion for new trial that have not been tested for truth. Likewise, as to Deck's theory that his restraints tainted his appearance before the jury, Deck must rely on statements of an advocate masquerading as facts, so the suggestion of taint or manipulation of his demeanor collapses as well. This record, consisting of conclusions that have no factual support and defense arguments that highlight the ostensible problem, cannot support overturning the sentences of death. In fact, the dearth of specifics on the record demonstrates the need for a rule that imposes at least a minimal burden on defendants: a burden to make a record as to what the jury can perceive.

ARGUMENT

I. Courtroom security issues, including decisions regarding restraints, are and must be discretionary.

Courtroom security, in any given courthouse and on any given day in America, depends on many factors. The defendant's history, the type of crime or crimes involved, the physical layout and features of the courtroom, and the number of and competing demands upon court security personnel can all figure prominently in a particular judge's decisions about how best to maintain safety and order. As a result, "[n]o one formula for maintaining the appropriate courtroom atmosphere will be best in all situations." *Illinois v. Allen*, 397 U.S. at 343.

Of course, concerns about the security of courtroom employees, witnesses, and spectators can clash with a defendant's desire to appear free from restraints. But a defendant's quest to avoid being identified as such cannot always be indulged. While defendants are entitled to "'have . . . guilt or innocence determined solely on the basis of the evidence introduced at trial,'" that "does not mean . . . that every practice tending to single out the accused from everyone else in the courtroom must be struck down." *Holbrook v. Flynn*, 475 U.S. at 567 (quoting *Taylor v. Kentucky*, 436 U.S. 478, 485 (1978)); *see also Kelly v. Oregon*, 273 U.S. 589, 591 (1927) (it "is a new meaning attached to the requirement of due process of law that one who is serving in the penitentiary . . . must, in order to secure a fair trial, be entirely freed from custody"). Indeed, this Court has recognized that jurors are more savvy than that:

> Recognizing that jurors are quite aware that the defendant appearing before them did not arrive there by choice or happenstance, we have never tried, and could never hope, to eliminate from trial procedures every reminder that the State

> has chosen to marshal its resources against a defendant to punish him for allegedly criminal conduct. To guarantee a defendant's due process rights under ordinary circumstances, our legal system has instead placed primary reliance on the adversary system and the presumption of innocence.

Holbrook v. Flynn, 475 U.S. at 567; *see also Estelle v. Williams*, 425 U.S. 501, 503, 512 (1976) (relying, in part, on the presumption of innocence in concluding that a state cannot constitutionally compel an accused to stand trial before a jury when dressed in identifiable prison clothes).

II. Guilt-phase concerns that may caution against the use of restraints, even when used to preserve courtroom security, do not apply in the penalty phase.

A. Courts have split over whether and when restraints can be used in the penalty phase of a capital trial.

Against this legal backdrop, courts have reached differing results when it comes to restraining a convicted felon in the penalty phase of a capital proceeding. Some, applying the teachings of this Court literally, have held that shackling is inherently prejudicial and should not be used – in guilt or penalty phase – absent a compelling state interest and consideration of less restrictive alternatives. *See, e.g., Elledge v. Dugger*, 823 F.2d 1439, 1450-52 (11th Cir. 1987) (relying on *Holbrook v. Flynn*, 475 U.S. at 568), *opinion withdrawn in part*, 833 F.3d 250, *cert. denied*, 485 U.S. 1014 (1988).[3] Others

[3] The Eleventh Circuit in *Elledge* acknowledged that *Holbrook* did not involve a penalty phase, but reasoned that this

have taken the position that shackling a convicted defendant at the outset of his penalty phase merely confirms what jurors already know – that the defendant has been convicted. *See, e.g., Marquez v. Collins*, 11 F.3d 1241, 1244 (5th Cir. 1994), *cert. denied* 513 U.S. 881 (1994) (highlighting the need for trial court discretion and rejecting any "least means" analysis when considering, on federal habeas review, shackling in the penalty phase).

This split presents more than a theoretical exercise. Courtroom security is a real concern when considering the fate of twice-convicted murderers like Deck; setting too strict a standard will "tie the hands of the [trial court] judge, rather than those of the defendant . . . [and] set the scene for . . . tragedy." *Lovell v. State*, 702 A.2d 261, 289 (Md. 1997) (Wilner, J., concurring).

B. The presumption of innocence does not apply in the penalty phase of a capital trial.

Courts that permit restraint of a convicted felon during the penalty phase of a capital trial have the better argument. That is because this Court has unambiguously decreed that once a defendant is convicted, his world – and, by extension, the world inside the courtroom – "changes dramatically." *Martinez v. Court of Appeal*, 528 U.S. 152, 162 (2000). No longer is the defendant the accused, or innocent; rather "[o]nce a defendant has been afforded a fair trial and convicted of the offense for which he was charged, the presumption of

Court was surely aware that capital cases were bifurcated and that *Holbrook* "means what it says." *Elledge v. Dugger*, 823 F.2d at 1451 n.22. Judge Edmondson, concurring in part and dissenting in part, took a different view, and urged that "[a] case is only authority for what it actually decides." *Id.*, 823 F.2d at 1454 n.3.

innocence disappears." *Herrera v. Collins*, 506 U.S. 390, 399 (1993).[4]

Deck lost the presumption of innocence when he was found guilty of two counts of murder by his first jury in 1998 (J.A. 1). Deck appealed those convictions, but they were affirmed on direct appeal. *State v. Deck*, 994 S.W.2d 527 (Mo. 1999), *cert. denied*, 528 U.S. 1009 (1999); (J.A. 6-39). Notably, Deck raised no issue as to the sufficiency of the evidence to support those convictions. *Id.* Therefore, Deck "in the eyes of the law . . . does not come before the Court as one who is 'innocent,' but, on the contrary, as one who has been convicted by due process of law of two brutal murders." *Herrera v. Collins*, 506 U.S. at 399-400.

[4] *See also Portuondo v. Agard*, 529 U.S. 61, 76 (2000) (Stevens, J., concurring in the judgment) (the presumption of innocence survives until a guilty verdict is returned); *Ramdass v. Angelone*, 530 U.S. 156, 207 (2000) (Stevens, J., dissenting) ("A guilty verdict, however, means that the defendant's presumption of innocence – with all of its attendant trial safeguards – has been overcome"); *Schlup v. Delo*, 513 U.S. 298, 326 n.42 (1995) (a defendant who has "been convicted by a jury of a capital offense . . . no longer has the benefit of the presumption of innocence"); *Delo v. Lashley*, 507 U.S. 272, 278 (1993) ("Once the defendant has been convicted fairly in the guilt phase of the trial, the presumption of innocence disappears"); *see also Duckett v. Godinez*, 67 F.3d 734, 747 (9th Cir. 1995) ("The presumption of innocence, however, no longer applies in the penalty phase of a bifurcated trial"); *Elledge v. Dugger*, 823 F.2d at 1450 (convicted defendant "no longer entitled to a presumption of innocence"). Several state supreme courts, in rejecting defendants' claims that their constitutional rights were violated by penalty phase restraints, have reached the same conclusion. *See State v. Young*, 853 P.2d 327, 350 (Utah 1993); *Duckett v. State*, 752 P.2d 752, 755 (Nev. 1988); *Bowers v. State*, 507 A.2d 1072, 1081 (Md. 1986), *cert. denied*, 479 U.S. 890 (1986).

When Deck came before the jury in the penalty-phase retrial, his two murder convictions were neither a secret nor were they in dispute. The jury was aware of its role solely as sentencer (Tr. 8, 106, 111, 183-85, 188, 201, 202, 215-16, 222, 230-32, 241, 244, 246, 248, 254, 273, 274).[5] The presumption of innocence did not and could not apply. Minus the presumption of innocence, the restraints equation changes substantially. *See Elledge v. Dugger*, 823 F.2d at 1453-54 (Edmondson, J., concurring in part and dissenting in part) (noting that "[t]he primary constitutional concern at the guilt-innocence phase – fear that the restraint will interfere with the defendant's presumption of innocence" is not present in the penalty phase, and that "the single major analytic thrust of all the guilt-innocence phase cases is to determine whether the defendant's right to a presumption of innocence was infringed by the security measure adopted by the trial court" (footnotes omitted)).

Deck, however, tries to resurrect a presumption that the jury knew to be untrue in his case, *i.e.*, that he was innocent of murder, by reference and analogy to this Court's double jeopardy jurisprudence (Petitioner's Brief "Pet. Br." at 23-28). Indeed, Deck tries to resurrect the presumption of innocence, even while conceding that it is "obviously not at issue in penalty phase" (Petition for Writ of Certiorari at 6). Having disavowed the presumption of innocence in his petition for writ of certiorari, Deck should not be permitted to rely on it in his brief.

[5] Of course, Deck also knew that he had already been convicted of two murders, among other crimes (J.A. 59-62). Quintessentially, Deck and others like him know that whatever their behavior, it will not extend what is already, at minimum, a sentence of life in prison without parole.

III. Concerns regarding the impact of restraints on the reliability of capital sentencing do not justify summarily reversing the verdict in this penalty-phase retrial.

A. The penalty phase of a capital trial raises concerns, not present in the guilt phase, about reliability of sentencing.

As the presumption of innocence necessarily falls out of any consideration of penalty-phase restraints, the penalty phase raises concerns, not present in guilt phase, about reliability in sentencing. Because "death is qualitatively different," there must be a "greater degree of reliability when the sentence of death is imposed." *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion).

To prevent arbitrary imposition of capital punishment and insure reliable sentencing, therefore, the Eighth Amendment requires the States "to perform two somewhat contradictory tasks" before imposing a sentence of death. *Romano v. Oklahoma*, 512 U.S. 1, 6 (1994) ("*Romano*"). "First, States must properly establish a threshold below which the penalty cannot be imposed." *Id.* To satisfy this requirement, States "must establish rational criteria that narrow the decisionmaker's judgment as to whether the circumstances of a particular defendant's case meet the threshold." *McCleskey v. Kemp*, 481 U.S. 279, 305 (1987).

But after this winnowing process is satisfied, the Eighth Amendment precludes the States from "limit[ing] the sentencer's consideration of any relevant circumstance that could cause it to decline to impose the penalty." *Id.* at 306. "To this end, 'States cannot limit the sentencer's consideration of any relevant circumstance that could cause it to decline to impose'" a death sentence, "'but must allow it to consider any relevant

information offered by the defendant.'" *Romano*, 512 U.S. at 7 (quoting *McCleskey v. Kemp*, 481 U.S. at 306); *see also Lockett v. Ohio*, 438 U.S. at 604 (the Eighth Amendment requires that "the sentencer . . . not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death" (emphasis in original)); *Eddings v. Oklahoma*, 455 U.S. 104, 113-14 (1982) ("Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, *as a matter of law*, any relevant mitigating evidence." (emphasis in original)). This Court's Eighth Amendment decisions on capital sentencing thus seek to insure that a State's sentencing procedures "suitably direct and limit the decisionmaker's discretion 'so as to minimize the risk of wholly arbitrary and capricious action.'" *Romano*, 512 U.S. at 7 (quoting *Gregg v. Georgia*, 428 U.S. 153, 189 (1976)).

But "[w]ithin these constitutional limits, 'the States enjoy traditional latitude to prescribe the method by which those who commit murder shall be punished.'" *Id.* at 7 (quoting *Blystone v. Pennsylvania*, 494 U.S. 299, 309 (1990)). "The States remain free, in capital cases, as well as others, to devise new procedures and new remedies to meet felt needs." *Payne v. Tennessee*, 501 U.S. 808, 824-25 (1991) (holding that introduction of victim-impact evidence during the penalty phase of a capital proceeding does not offend the Eighth Amendment); *see also Romano*, 512 U.S. at 10-12 (extending this principle to evidentiary rules in capital sentencing proceedings). This latitude must also extend to allowing the States to adopt security measures to insure the orderly conduct of criminal proceedings, including the discretion to restrain a convicted murderer during a penalty-phase retrial. The employment of such security measures neither makes capital sentencing decisions unreliable, nor precludes a defendant from offering

mitigating evidence.

In considering the reliability of sentencing decisions under the Eighth Amendment, this Court has focused on whether the sentencer has been given inaccurate or misleading information. For example, in *Caldwell v. Mississippi*, 472 U.S. 320 (1985), the prosecutor in a capital murder case argued to the sentencing jury that its verdict as to punishment was not "final," but, instead, was reviewable by the appellate courts. *Id.* at 325-26. This Court held that it was impermissible under the Eighth Amendment "to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." *Id.* at 328-29. "[T]he prosecutor's remarks were impermissible because they were inaccurate and misleading in a manner that diminished the jury's sense of responsibility." *Id.* at 342 (O'Connor, J., concurring).[6]

Caldwell involved affirmatively misleading statements during argument that affected the sentence's reliability. But incomplete information resulting from a defendant's inability to present accurate mitigation evidence also raises reliability concerns. Thus, in *Skipper v. South Carolina*, 476 U.S. 1 (1986), this Court found an Eighth Amendment violation when a capital defendant was precluded from presenting mitigating evidence concerning his good behavior while in jail awaiting

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[6] "As Justice O'Connor supplied the fifth vote in *Caldwell*, and concurred on grounds narrower than those put forth by the plurality, her position is controlling." *Romano*, 512 U.S. at 9. *Caldwell* has since been read as "relevant only to certain types of comments – those that mislead the jury as to its role in the sentencing process in a way that allows the jury to feel less responsible than it should for the sentencing decision." *Id.* (quoting *Darden v. Wainwright*, 477 U.S. 168, 184 n. 15 (1986)).

trial in a case in which the defendant's future dangerousness was at issue. But in *Romano*, this Court found no Eighth Amendment violation when the defendant's conviction and death sentence in a separate case were admitted into evidence during the penalty phase of his capital murder trial because the evidence was "accurate" when the penalty phase was held. 512 U.S. at 14-15 (O'Connor, J., concurring). *See also California v. Ramos*, 463 U.S. 992 (1983) (holding that the Eighth Amendment is not violated by a state law requiring an instruction accurately informing the sentencing jury that a sentence of life imprisonment without the possibility of parole may be commuted by the Governor to a sentence that includes the possibility of parole).

Like its Eighth Amendment cases, this Court's cases construing the Fourteenth Amendment's Due Process Clause in the context of capital sentencing focus on ensuring accuracy by perserving defendant's ability to meet the evidence relied on by the State and to introduce accurate evidence of his own.[7]

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[7] Claims under the Due Process Clause, which applies to the penalty phase of capital proceedings, *Romano*, 512 U.S. at 12, are analyzed more narrowly than claims involving the deprivation of specific constitutional rights. *See Medina v. California*, 505 U.S. 437, 443 (1992). Consequently, in evaluating a Due Process Clause claim, the "relevant question . . . is whether [the alleged error] so infected the sentencing proceeding with unfairness as to render the jury's imposition of the death penalty a denial of due process." *Romano*, 512 U.S. at 12. And, the specific alleged error is not viewed in "artificial isolation," but is considered in the context of the entire proceeding. *Cupp v. Naughten*, 414 U.S. 141, 146-47 (1973). *See also Darden v. Wainwright*, 477 U.S. at 180-81 (prosecutor's closing argument, though widely condemned and "undoubtedly" improper, did not "'so infect[ ] the trial with unfairness as to make the resulting conviction a denial of due process'") (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)).

For example, in *Gardner v. Florida*, 430 U.S. 349 (1977), this Court held that a defendant's due process rights were violated when the judge who sentenced him to death relied on confidential information contained in a pre-sentence report not made available to the defendant.[8] *Id.* at 362. The defendant's death sentence in *Gardner* was reversed, "[b]ecause of the potential that the sentencer might have rested its decision in part on *erroneous or inaccurate* information that the defendant had no opportunity to explain or deny." *California v. Ramos*, 463 U.S. at 1004 (emphasis supplied). Similarly, the Court has insisted most notably in *Simmons v. South Carolina*, 512 U.S. 154 (1994) ("*Simmons*"), that a capital defendant be permitted to inform the jury of accurate information concerning his parole ineligibility when future dangerousness is at issue. *See* 512 U.S. at 178 (O'Connor, concurring in the judgment) (holding that a defendant, who was sentenced to death and whose future dangerousness was made an issue by the State, was denied due process when the trial court prevented him from presenting evidence or argument during the penalty phase that he was ineligible for parole, and the only sentencing alternatives available to the jury were death or life imprisonment without parole).[9] *See also Shafer v. South Carolina*, 532 U.S. 36, 54 (2001) (applying the *Simmons* rule and rejecting the State's claim that a third sentencing alternative was available to the jury); *Kelly v. South Carolina*, 534 U.S. at 252-255 (again applying the *Simmons* rule and rejecting the State's claim that the defendant's future dangerousness was not at issue under the

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[8] Justice White, who supplied the fifth vote reversing the conviction, concurred in the judgment, but expressed his opinion that the decision in *Gardner* was controlled by the Eighth Amendment. *Id.* at 362-64.

[9] Justice O'Connor wrote the "prevailing opinion" that controls. *Kelly v. South Carolina*, 534 U.S. 246, 258 (2001) (Rehnquist, J., dissenting).

facts in that case); *compare Ramdass v. Angelone*, 530 U.S. at 181 (O'Connor, concurring in the judgment) (holding that the *Simmons* rule did not apply because an instruction on parole ineligibility would have been inaccurate because the defendant was not actually parole ineligible at the time of sentencing).

B. The use of restraints in Deck's penalty-phase retrial did not, by itself, render the death sentences unreliable because the jury was not misled and Deck was not precluded from presenting mitigating evidence relating to restraints or any message those restraints might have conveyed.

In the context of capital sentencing proceedings, then a constitutional violation occurs when the sentencer is prevented from receiving relevant, accurate information regarding sentencing. Put another way, constitutional concerns arise where the State's procedures have caused the sentencing entity to be misinformed or misled – either because the defendant was barred from telling some part of his story, or because the state, by word or deed, sent a misleading message.

The restraints applied here violated neither the Eighth Amendment nor the Due Process Clause because the sentencer was not misled and Deck was not precluded from presenting any relevant mitigating evidence relating to restraints or any message those restraints might have conveyed. Here, Deck claims that the use of restraints implicated concerns with reliability of sentencing – *i.e.*, that the jury was misled. But his claim is based on the simple fact that he was restrained, and that fact alone does not mislead.

To the contrary, restraints in penalty phase simply reflect what the jurors already know: that the defendant has been convicted. *Elledge v. Dugger*, 823 F.2d at 1454 (Edmond-

son, J., concurring in part and dissenting in part) (in penalty phase, "the shackles are expected"). That a person convicted of two vicious murders would be physically restrained in some way could hardly come as a shock. Indeed jurors might be far more concerned to see a twice-convicted murderer no more restrained than they, a position the trial court took in this case (J.A. 58-59).[10] Deck had been convicted of two counts of murder and the jury knew this; this fact alone, therefore, made Deck a person who, indisputably, was dangerous.

Likewise, any restraint of his person would not have been surprising or misleading to the jury given that the penalty-phase retrial occurred more than five years after the first trial (J.A. 1). Whatever the jurors may or may not have suspected about the first trial, or the appellate process that netted Deck a second penalty phase, it would be the naive juror indeed who thought that Deck was wandering the streets in the years intervening. Though not explicitly stated, the jurors must have known that Deck had been in prison, and for a substantial period of time. Any restraint at the second penalty phase, therefore, was nothing more than a predictable manifestation of what was already fairly obvious.

Restraints, moreover, do not mislead the jury by leading inevitably and exclusively to the conclusion that the defendant is dangerous. Although their use may confirm that a twice-convicted murderer has already been – and ought to be – separated from society and might incrementally heighten the jurors' extant awareness that Deck, a convicted murderer, was dangerous, they also convey a message of control. That is,

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[10] *See Lovell v. State*, 702 A.2d at 288 (Wilner, J. concurring) (where defendant was convicted of killing a police officer, "the average juror would be at least incredulous, if not truly fearful, to see such a person sitting just a few feet away without some form of visible restraint").

jurors may assume that if a defendant, like Deck, is being successfully controlled in restraints, then he would likely do well in a structured, restraining environment like prison.

Deck, however, seizes on *future* dangerousness, arguing that jurors consider it, and he complains that his restraints carried the misleading message that he had already been adjudicated to be dangerous (Pet. Br. at 29-30).[11] But the prosecutor did not argue future dangerousness. To the contrary, the prosecutor's argument focused on the circumstances surrounding the murders Deck had committed and framed the request for a death sentence on those factors alone (Tr. 545-53, 559-63). Nothing in the prosecutor's closing argument suggested that Deck was a future danger or that the jury should consider future dangerousness in imposing its sentence.

In fact, while the State did not discuss future dangerousness, defense counsel did, and pleaded for Deck's life on the basis that, though dangerous, Deck could be controlled

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[11] Although the Missouri Supreme Court has noted that evidence of future dangerousness may be admitted during the penalty phase of a capital case, *State v. Chambers*, 891 S.W.2d 93, 107 (Mo. 1994), Missouri statutes, unlike those in some other states, do not make future dangerousness an issue that must be considered by the jury during its penalty phase deliberations. *See* Mo. Rev. Stat. § 565.032 (2000). The closest Missouri comes to a statutory aggravating circumstance that potentially touches on the issue of future dangerousness is one asking the jury whether the "offense was committed by a person with a prior record of conviction for murder in the first degree, or the offense was committed by a person who has one or more serious assaultive criminal convictions." Section 565.032.2(1). This latter circumstance was not a statutory aggravating circumstance in Deck's case (J.A. 65-67).

and thwarted from harming the public by incarcerating him for life:

> •"You know what, life without parole, life with never be eligible for parole [sic], he certainly deserves that. He should never be on the streets" (Tr. 553).
> •"A life verdict mean [sic] he'll never walk the street. He will go to prison. He will never be free" (Tr. 555).
> •"You know that under that good structure [in a particular foster home placement] that he could survive and actually the penitentiary is the ultimate structured environment and the rest of his life he's never eligible for parole" (Tr. 555).
> •"One of the things that we do under our law, there are times when it's appropriate to actually kill another human being out of self-defense and in this case you can take care of that. He will be in prison for the rest of his life" (Tr. 558).

Given that the State did not argue future dangerousness, while the defense all but admitted it, Deck cannot bring himself within the rule of *Simmons* or show that he was somehow prevented from presenting meaningful evidence or arguments.[12] This is so even though "[e]vidence of future dangerousness under *Simmons* is evidence with a tendency to prove dangerousness in the future" and "its relevance to that point does not disappear merely because it might support other

[12] Indeed, defense counsel's argument is akin to the prosecutor's argument in *Simmons* that the jury had to figure out "what to do with [petitioner] now that he is in our midst" and that a "verdict for death would be 'a response of society to someone who is a threat. Your verdict will be an act of self-defense.'" *Simmons*, 512 U.S. at 157 (citations omitted).

inferences or be described in other terms." *Kelly v. South Carolina*, 534 U.S. at 254 (footnote omitted). While "evidence of violent behavior in prison can raise a strong implication of 'generalized . . . future dangerousness,'" *Id.* at 253 (quoting *Simmons*, 512 U.S. at 171), the shackling of a defendant in the penalty phase seems, at best, an implication once removed.

Even assuming that Deck's restraints raised implications of future dangerousness not already highlighted by defense counsel in closing argument, the implications that Deck is left with, if any, are those relating, however tenuously, to any danger he might pose to other prisoners. And, while this is certainly a valid consideration for juries, standing alone it seems unlikely that this additional veneer would transmogrify what would otherwise have been a life sentence into a unanimous decision to give death. *See State v. Finch*, 975 P.2d 967, 1014 (Wash. 1999), *cert denied*, 528 U.S. 922 (1999) (Talmadge, J., dissenting) (arguing that the theory that shackles tip the balance and cause juries to give death out of "solicitude for the safety of imprisoned criminals" required "substantial suspension of disbelief"); *see also Hall v. Luebbers*, 296 F.3d 685, 699 (8th Cir. 2002), *cert. denied*, 538 U.S. 951 (2003) (finding unpersuasive the suggestion that penalty-phase shackling "would necessarily lead jurors to conclude that they must impose a death sentence" because the shackles could be seen as a reasonable security measure since the jurors had found defendant guilty of first-degree murder); *Romano*, 512 U.S. 13-14 (holding that it was "impossible to know," and an "exercise in speculation" to determine, how evidence of the defendant's prior death sentence influenced the jury's verdict and that it was "equally plausible" that this evidence made the jurors either more or less inclined to impose a sentence of death, either conclusion resting "upon one's intuition").

Whatever the implications left from shackling, Deck argues repeatedly that those implications "were not proven by

evidence or subject to confrontation by the defense" (Pet. Br. at 13); raised "prejudices or suggestions that the defendant is not allowed to rebut" (Pet. Br. at 28); and were, variously, "unproven," "unrebuttable," and "potentially false" (Pet. Br. at 29); *see also* Pet. Br at 37 ("as in *Simmons*, the defendant does not have the chance to refute . .. information" about shackling); Pet. Br. at 37 (discussing *Gardner v. Florida*, 430 U.S. 349 (1997)).

But, again, the question here is whether sentencing was reliable, and reliability is judged, in part, on whether Deck was able to present evidence to rebut evidence and inferences in his penalty-phase retrial. Deck was never denied an opportunity to rebut anything. He does not cite to any ruling denying him the opportunity to rebut the supposed specter of dangerousness that his restraints conjured, or refusing to provide instruction to the jury that would disabuse them of any false or unfair notions stemming from restraints. Nor does Deck point to any evidence that might tend to show that he would not be a danger in the future. Such evidence was not forthcoming despite the wide latitude afforded. Deck's claim that the implications raised by his restraints were "unrebuttable," therefore, may prove too much, as he was either unable[13] or unwilling[14] to garner evidence that might refute any residual hint of dangerousness suggested by the restraints beyond that suggested by his killing of two innocent human beings.

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[13] It is certainly possible that there was no evidence that Deck behaved or adjusted in prison; in jail awaiting his first trial, Deck "acted out quite a bit" (PCR Tr. 224). Deck experienced these kinds of difficulties due to what his attorney described as a "low frustration level" (PCR Tr. 223-24).

[14] "Unwilling" seems to be a real possibility, given Deck's conspiracy theories and claims of innocence (Tr. 566-68).

C. To the extent that Deck might have been put to the choice of whether to offer evidence that might rebut any allegedly misleading inferences created by restraints, any such choice was not of a constitutional dimension.

At root, Deck claims that he was barred from addressing the allegedly misleading message sent by restraints because he was precluded from rebutting the mere suggestion of dangerousness that restraints might have raised. That really amounts to a claim that he either could not provide such rebuttal, or that he could but was unsure whether to do so and was unhappy about being put to the choice.

As to the former – that he could not provide rebuttal – again, if Deck had relevant evidence in mitigation of punishment that could provide the jury a basis for a sentence less than death, or, more particularly, evidence that would blunt any "negative conclusions" (Pet. Br. at 37) flowing from restraints, he need only have brought it to court. But he did not. Nor did he make a claim in the trial court that he had such evidence, but, due to the recency of the trial court's final decision on restraints, the defense needed additional time to bring it forth.

As to the latter proposition – that perhaps Deck chose not to bring in any evidence to blunt whatever negative assumptions the jury might draw from restraints – the problem confronting Deck at trial is the same problem at issue here: shackling in penalty phase is ambiguous. Evidence of conduct problems in prison or prosecutorial argument urging jurors to mete out a death sentence lest the defendant victimize again, carry a plain and articulable message of future dangerousness. But shackling may carry a mixed message, or no message at all.

The real issue, therefore, is not that Deck was precluded

from presenting evidence in mitigation, because he certainly was not. Rather, Deck's complaint is that he either had to leave restraints unaddressed or to confront them with evidence that could well be assailed and leave him worse off than before. So, the question then becomes, is that a choice that the Constitution protects Deck from having to make? It is not. Indeed, such choices are both common and, largely, constitutional:

> The "criminal process, like the rest of the legal system, is replete with situations requiring the making of difficult judgments as to which course to follow. Although a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses, the Constitution does not by that token always forbid requiring him to choose." *McGautha v. California,* 402 U.S. 183, 213 (1971) (citation and internal quotation marks omitted).

McKune v. Lile, 536 U.S. 24, 41 (2002).

In *McKune v. Lile*, the prisoner asserted that his Fifth Amendment rights were violated by requiring him to disclose his sexual offenses as part of a sex offender treatment program or not participate in the program at all, with a loss of various prison privileges as the result. *Id.* at 30. Deck, on the other hand, makes the bare claim that "[t]he defendant is forced to choose which of two vital constitutional principles he will forego" (Pet. Br. at 36), though he does not actually identify those constitutional principles by specific reference to the Constitution. What he does say is that he was forced to either allow the jury to "draw negative inferences from the shackling, and thereby have the death-eligibility elements determined under a diminished standard of proof," or to prove that the restraints were unwarranted, "thereby . . . shift[ing] the burden of proof to him" (Pet. Br. at 36).

Deck is wrong on both counts. As to the death-eligibility decision, under Missouri's statutory scheme, § 565.030.4, Mo. Rev. Stat. (2000), the jury must first find the existence of a statutory aggravating circumstance – circumstances that, in Deck's case, related factually to the details of the crime. Deck does not and could not seriously dispute them, and restraints had no bearing on, or relevancy to, those circumstances anyway.

As to the second and third steps of Missouri's statute, Deck argues that they relate to the death-eligibility decision in an attempt to liken his penalty-phase retrial to determinations a jury makes in a guilt-phase proceeding (Pet. Br. at 35, relying on *State v. Whitfield*, 107 S.W.3d 253, 258-61 (Mo. 2003)). Under the Missouri statute in effect when Deck was tried, the penalty-phase jury had to consider four steps before imposing a death sentence. *See* Mo. Rev. Stat. § 565.030.4 (2000). First, it had to find the existence of at least one statutory aggravating circumstance. Second, it had to conclude that the evidence in aggravation of punishment taken as a whole warranted a death sentence.[15] Third, it had to determine that the evidence in mitigation of punishment was insufficient to outweigh the evidence in aggravation. And, fourth, it must decline to use its unfettered discretion to impose a life sentence. Relying on the *State v. Whitfield*, and its interpretation of *Ring v. Arizona*, 536 U.S. 584 (2002), Deck argues that the findings under the second and third steps are "factual" findings.

But, the second and third steps under the Missouri scheme do not require the finding of a particular fact, but ask the jury to use its discretionary judgment in determining

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[15] In 2001, the Missouri legislature removed step 2 as a required separate finding. *See State v. Whitfield*, 107 S.W.2d at 259 n.5; *see also* Mo. Rev. Stat. § 565.030 (2002).

whether the circumstances taken as a whole warrant death and whether mitigating circumstances exist that are sufficient to outweigh the aggravating circumstances. The issue in *Ring* was limited only to whether a statutory aggravating circumstance must be found by a jury instead of a judge–the Court expressly stated that it was not considering any claim regarding mitigating circumstances or whether a jury must make the ultimate decision whether to impose a death sentence. *Ring*, 536 U.S. at 597 n. 4. Any doubt about the limitation of this Court's holding in *Ring* is resolved by Justice Scalia's concurring opinion: "What today's decision says is that the jury must find the existence of the *fact* that an aggravating factor existed." *Id.* at 612 (Scalia, J., concurring) (emphasis in original). Consequently, the majority in *State v. Whitfield* misinterpreted *Ring* by suggesting that *Ring* required it to find that steps two and three under Missouri's scheme are "factual" determinations. *See State v. Whitfield*, 107 S.W.3d at 259-61.

In any event, whatever hint of future dangerousness stemming from restraints might have materialized, beyond the obvious dangerousness of a man with two murder convictions and convictions on a dozen or so other offenses (J.A. 59-62), it would not have changed the calculus. This is especially so because the restraints were not misleading to the jury in any way – as a twice-convicted murderer, Deck most assuredly is dangerous, and his counsel said as much in his closing argument.

As to the actual decision to impose the death penalty, where Deck claims that he would have been required to shoulder the burden of proof (Pet. Br. at 36), he misapprehends the jury's role at this point. As opposed to guilt-phase or death-eligibility determinations, which are factual, the decision in Missouri to impose the death penalty or a life sentence is ultimately a discretionary, moral one. *State v. Whitfield*, 107 S.W.3d at 277-78 (Limbaugh, Jr., C.J., dissenting).

At the end of the day, therefore, Deck has no constitutional right to avoid strategic choices, particularly on the factually unsupportable position that the trial court somehow prevented him from making them. Restraints, entirely expected as they are once one has been found guilty of murder, did not change the death-eligibility decision here (and, notably, two juries have found their way down that path without difficulty), and matter not when the jury's ultimate discretionary and moral decision is at issue, permitting as it does the consideration of any relevant evidence in mitigation that the defendant might offer as a reason to give a sentence less than death.

IV. The minimal record in this case provides no basis for holding that this particular penalty-phase retrial was unconstitutionally tainted by the use of restraints.

A. Deck failed to create a record that would meet even a minimal standard for showing that his restraints were inappropriate.

The record here is bereft of any evidence that jurors noticed or cared about Deck's restraints save for the fact that defense counsel brought the issue to their attention. Thus Deck can prevail only if the Court holds that there is a presumption against use of restraints in penalty-phase retrials – and that the presumption is so strong that once a defendant cries "Restraints!," the court must gather evidence to support its decision and the prosecution must bear the burden of proof to justify the court's choice. For the reasons stated above, the precedents that apply to guilt-phase restraints cannot justify such a rule in this context.

Once a defendant has been found guilty of murder, and the only choice is between indefinite incarceration and death,

there must be some burden on the defendant. The now-convicted defendant should be required to not just object, but to follow up by creating a record, including presenting evidence if necessary, of what the jurors could and could not see, hear, or otherwise perceive regarding the defendant's restraints; the defendant would then have the opportunity to contest the need for the restraints by disputing the basis for that decision. *See Elledge v. Dugger*, 823 F.2d at 1453 (Edmondson, J., concurring in part and dissenting in part) (noting that "the defense did not request a hearing, nor did the defense contest the factual accuracy of the judge's statements, request curative instructions or suggest alternative, less restrictive means of restraint") (footnotes omitted).[16] Then an appellate court would have something, at least, to review.

This record, and Deck's brief, cry out for such a rule. Again, there is no evidence in the record that the jurors saw, heard, or otherwise perceived anything about Deck's restraints until defense counsel brought the restraints to the jurors'

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[16] Deck did not do any of these things either, except for suggesting alternative, less restrictive means of restraint (J.A. 41-56). Deck muddies the facts on the timing of that request; he argues that after he was "led into court wearing leg irons and handcuffed to a belly chain" on the morning of trial, defense counsel "immediately" filed a motion objecting to the restraints (Pet. Br. at 3). In reality, the second penalty-phase trial began on April 29, 2003, and Deck filed his motion that same day (J.A. 1). But, absent a time stamp on the motion, there is nothing in this record to suggest that Deck did not file the motion prior to trial commencing and prior to allegedly being "led into court wearing leg irons and handcuffed to a belly chain" (Pet. Br. at 3, citing J.A. 68-69), because according to Deck, the trial court had ordered him to appear in leg braces three weeks prior (Pet. Br. at 3, citing J.A. 68). In other words, the motion could have been filed pre-trial, in response to the leg-brace-only ruling, as opposed to "immediately" following the court's decision to augment the restraints.

attention. Deck's motion for new trial contains nothing more than post hoc conclusions about what the jurors saw, unencumbered by actual, record evidence (J.A. 68-69). Deck's brief, consistently and of necessity, carries forward the tenor of the motion for new trial through the use of descriptive phrases that simply have no support in the record.

Deck speaks colorfully but in the abstract of "[p]arading the defendant before the jury in chains" (Pet. Br. at 38) and forcing defendants "to shuffle to the witness stand in handcuffs and leg irons, chains jangling, in full view of the jury" (Pet. Br. at 39). As to his own situation, Deck argues that on the morning of trial, he "was led into court" in restraints (Pet. Br. at 3, citing J.A. 68-69), and "[t]he restraints were visible," because "the jury clearly saw Deck – chained, handcuffed and shackled – paraded in and out of the courtroom or standing when the judge and jury entered or left the courtroom," but he can only cite again to the motion for new trial in support (Pet. Br. at 46, citing J.A. 69).

A motion for new trial, of course, is not evidence. To get out from under that problem, Deck notes that at sentencing "neither the court nor the prosecutor disputed these facts [sic]" or the "further detail [sic] regarding the physical restraints used at trial" (Pet. Br. at 11). That the State did not refute conclusions that defense counsel was attempting to pass off as "facts" is hardly surprising; counsel chose not to argue the motion for new trial, so there would be no reason for the State to bid against itself in this fashion and try to refute arguments it thought Deck might think were important, nor would there be any reason for the court to get involved.

Because without a record on restraints, we cannot possibly know how they affected Deck (or the jury), Deck's brief speaks largely of the theoretical. For example, Deck argues that if defendants know that they will have to appear

before the jury in restraints, "some defendants may relinquish altogether their right to be present" (Pet. Br. at 39), though we know that Deck did not relinquish that right. Deck argues that "[a] defendant may decide that it is preferable for the jury not to observe him at all, rather than to view him in full restraints" and thus absent himself from trial (Pet. Br. at 39), though we have no idea if Deck was thinking in those terms, and there is nothing in the record to suggest that he did not remain present throughout trial. Deck argues that "shackling may discourage the defendant from testifying" (Pet. Br. at 39), and while we do not know precisely why Deck did not testify, we do know that later he claimed innocence, and that an innocence claim at penalty phase might annoy or antagonize jurors who have been told that the defendant's guilt had already been determined.

As to the minimal facts we do know, Deck argues that he did not cause disturbances at his earlier court proceedings (Pet. Br. at 43), though perhaps that was because Deck wore leg braces during his initial trial (J.A. 5). In any event, he also faults the trial court for not considering various alternative forms of restraint (Pet. Br. at 43-44), but while his motion provided a fairly comprehensive legal discussion, including mention of security measures besides shackling, his plea for relief was to be entirely free of restraints, without qualification or request for alternative relief (J.A. 41, 56). Likewise, at trial Deck objected to restraints and asked to have the venire panel stricken, but he did not suggest the use of alternative forms of restraint or different courtroom security measures (J.A. 57-59). It would be difficult to fault the trial court for failing to implement alternative security measures that Deck himself did not, or did not want to, wholeheartedly endorse.

This Court is left, therefore, with a record that appears to be scant by design. True, the trial court did not *sua sponte* make a detailed evidentiary record regarding its rationale for restraints, and that would have been helpful. But, the test is not

whether the trial court could have done a better job; the test is whether the trial court's action or inaction violated a specific constitutional guarantee. *See Portuondo v. Agard*, 529 U.S. at 76 (Stevens, J., concurring in the judgment) (noting the "high threshold that separates trial error – even serious trial error – from the kind of fundamental unfairness for which the Constitution requires that a state criminal conviction be set aside"). And again, in the penalty-phase context, a defendant should be required to make at least a minimal record before he can impose on the court or the state an obligation to disprove his claim of a constitutional violation.

B. Deck's restraints did not adversely affect his ability to assist counsel or to participate at trial, nor did they unfairly manipulate his comportment before the sentencing jury.

Beyond his Eighth Amendment and Due Process claims, Deck suggests he can make a Sixth Amendment challenge. Though Deck objected at trial that the restraints "ma[d]e him look dangerous" (J.A. 58), Deck has never complained that the restraints affected his ability to communicate with counsel – until now, albeit obliquely, in his brief before this Court (Pet. Br. at 39). Deck also extrapolates and argues that because restraints negatively affected his appearance, this derogated his right to be present at trial – again, a complaint he never made in state court (Pet. Br. at 18, 38).

Addressing the latter contention first, Deck was present during his trial. As to the former contention, regarding Deck's ability to assist counsel or participate at trial, Deck's penalty phase was his second. It did not differ materially from the first. As a consequence, nothing in the second penalty phase was factually novel. To the extent that Deck's ability to assist counsel related to matters of fact in dispute, he could have and should have explored any such controversies with his counsel

in connection with the first penalty phase. Moreover, on this record, there is no indication of what, if anything, Deck was hoping to communicate to counsel but, due to restraints, could not.

In lieu of any such objections or facts on which they could have been based, Deck relies on *Riggins v. Nevada,* 504 U.S. 127, 134-38 (1992), in support of the notion that "[s]hackling jeopardizes the right to be present by affecting the defendant's ability to participate fully in the proceedings and by tainting his appearance before the jury" (Pet. Br. at 18); *see also* Pet. Br. at 38 (by shackling, "the state uses the defendant's presence at trial against him" and "manipulates the evidence"). Riggins was required to take anti-psychotic medication during trial. *Riggins v. Nevada,* 504 U.S. at 130-131. At trial, Riggins' defense was insanity, and he testified at trial that voices in his head told him that killing his victim would be justifiable homicide. *Id.* at 131. The jury convicted Riggins and sentenced him to death. *Id.*

This Court held that involuntarily medicating Riggins with anti-psychotic drugs was improper. *Id.* at 135-138. Unless the state could show that forcible medication was "medically appropriate and, considering less intrusive alternatives, essential for the sake of Riggins' own safety or the safety of others" it could not force him to go to trial when involuntarily medicated. *Id.* at 135.

Forcible medication, in Riggins' case, "may well have impaired the constitutionally protected trial rights Riggins invoke[d]."[17] *Id.* at 137. Riggins' medication, at the dosage

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[17] The grant of certiorari in *Riggins* was "to decide whether forced administration of antipsychotic medication during trial violated rights guaranteed by the Sixth and Fourteenth

administered, had serious side effects that quite possibly "had an impact upon not just Riggins' outward appearance, but also the content of his testimony on direct or cross-examination, his ability to follow the proceedings, or the substance of his communication with counsel." *Id.* Thus Justice Kennedy expressed concern about the side effects of anti-psychotic medication, such as restlessness, Parkinsonism, slowed speech functions, or a "sedation-like effect" that may affect thought processes. *Id.* at 142-143 (Kennedy, J., concurring). Where forced medication results in side effects that alter demeanor and affect cognition, the State may not "manipulate[] the evidence in this way." *Id.* at 142-143; *see also*, 504 U.S. at 139 (Kennedy, J., concurring), citing *Brady v. Maryland,* 373 U.S. 83, 87 (1963), and *Arizona v. Youngblood,* 488 U.S. 51, 58 (1988) ("When the State commands medication during the pretrial and trial phases of the case for the avowed purpose of changing the defendant's behavior, the concerns are much the same as if it were alleged that the prosecution had manipulated material evidence.").

But restraints are quite unlike forced medication. First, while such medication is avowedly to change the behavior of a mentally ill defendant so that he may be tried, shackles are a response to courtroom security issues, of which the defendant's possible behavior is but one of several variables. Second, while a defendant's reaction to anti-psychotic medication will depend on his unique physiology and the dosage, a defendant's reaction to restraints is largely, if not entirely, a product of his own

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Amendments." 504 U.S. at 132-133. Riggins raised an Eighth Amendment claim that the forced administration of medication "denied him an opportunity to show jurors his true mental condition at the sentencing hearing" but because Riggins did not present the issue in state court or in the petition for certiorari, this Court declined to address the Eighth Amendment question. *Id.* at 133.

choice.[18] Third, that volitional reaction to restraints is not the kind of "manipulation" of evidence that occurs with forced medication, which can produce any number of uncontrollable, undesirable side effects. Indeed, a restrained defendant who is able to comport himself appropriately in the courtroom may be able to shape the impressions that the jury is left with; if jurors see that a restrained defendant is behaving appropriately, they may conclude that he will likely conduct himself appropriately in a structured prison environment.

Deck's *Riggins* analogy thus disintegrates. While forced medication can affect a defendant in various ways that may "impact . . . the content of his testimony on direct or cross examination, his ability to follow the proceedings, or the substance of his communication with counsel," 504 U.S. at 137, restraints do not touch – literally or figuratively – upon a defendant's personhood. In all but the most extreme cases[19] – and Deck's is not one of them, even assuming the accuracy of Deck's creative description – restraints may make it more challenging for a defendant to physically, mechanically communicate with counsel, but restraints would not change the substance of what a defendant can say or how he might say it.

Any effect of restraints in sentencing, therefore, simply cannot be compared to the prejudice that can result from forced medication. While restraints may touch a defendant's hands or

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[18] *But see Spain v. Rushen*, 883 F.2d 712, 723 (9th Cir. 1989), *cert. denied*, 495 U.S. 910 (1990) (affirming grant of habeas relief where extensive record showed that defendant was "heavily chained" throughout four years' worth of pretrial proceedings and seventeen months' worth of trial, and defendant's complaints about the pain caused by his restraints were "immediate, chronic, and impassioned").

[19] *See Spain v. Rushen*, 883 F.2d at 723.

legs, they in no measure compromise his heart or mind, or affect his contrition or lack thereof.[20]

C. Deck's restraints were not an affront to courtroom dignity.

Finally, Deck mentions an affront to courtroom decorum as a factor in the restraints calculus, in regard to the guilt phase anyway (Pet. Br. at 17-18). While this factor militates against the use of restraints generally, it is the least important one in the calculus as any affront to courtroom dignity and decorum cannot be tied to individualized prejudice. *See Spain v. Rushen*, 883 F.2d at 722. Indeed, the use of restraints, whether during the guilt or the penalty phase, may work to preserve the dignity and decorum of the courtroom. *See Marquez v. Collins*, 11 F.3d at 1244 ("shackling a defendant may be necessary to *preserve* the dignity of the trial and to secure the safety of its participants" (emphasis supplied)).

The suggestion that use of restraints is an affront is particularly weak on this record, where there is no evidence that jurors saw, heard, or otherwise perceived anything about restraints until Deck's counsel brought them to the jury's attention; it is difficult to imagine how any affront to courtroom dignity occurred at all, much less an affront that threatened the fairness of Deck's penalty-phase retrial. This is underscored by the fact that none of the state's witnesses — many of whom were in law enforcement — identified Deck as the person in restraints; rather, they identified him based upon the particulars of his civilian attire (Tr. 303, 308, 347, 429). *Cf. Estelle v. Williams*, 425 U.S. at 501 n.1 (Brennan, J., dissenting) (noting that the defendant had appeared at trial in a t-shirt and

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[20] As noted, though Deck did not testify, he revealed his utter lack of contrition at sentencing (Tr. 566-68).

dungarees with "Harris County Jail" stenciled on them, and that "[b]oth of the principal witnesses for the State at respondent's trial referred to him as the person sitting in the 'uniform'"). However indecorous any restraints might have been, they were not an affront to the dignity or decorum of Deck's courtroom because, on this record, there is no evidence that either the witnesses or the jurors even noticed them.

V. Deck has not shown error, much less harmless error.

At the start of his penalty-phase retrial, Deck was a twice-convicted murderer who had long since lost the presumption of innocence and who was once again facing the stark reality of either death or life imprisonment without possibility of probation or parole. In these circumstances, restraints could hardly be said to be misleading, as murderers like Deck are, by definition, dangerous. And, to the extent that Deck's restraints might have suggested that Deck would present a danger in the future to his fellow inmates, any such suggestion – adding only incrementally as it does to the notion that Deck was, indisputably, a dangerous person – would not have caused jurors to vote for death.

Deck received all the process that was his due. His penalty-phase retrial was neither unfair nor its result unreliable, and the limited record in this case – where Deck highlighted his own restraints for the jury – cannot support overturning his sentences on any constitutional basis.

Thus, Deck has failed to establish a constitutional violation under these facts. Deck's harmless error analysis, therefore, collapses. Before that standard may be applied, a defendant must demonstrate a constitutional violation. *See Darden v. Wainwright*, 477 U.S. at 183 n. 15. Deck has failed to carry that burden here. And, by arguing that it is unconstitutional to restrain a defendant *without justification*

(Pet. Br. at 15), Deck concedes that the use of restraints is not *per se* unconstitutional; thus, his constitutional claim does not involve a "structural defect" in the trial's framework not amenable to harmless-error analysis. *See Arizona v. Fulminate*, 499 U.S. 279, 309-10 (1991). So, even if Deck had established a constitutional violation in the method or procedure the trial judge employed in ordering restraints, the same reasoning that reveals no constitutional violation also demonstrates that any constitutional violation that may have occurred was, on the facts of this case, harmless beyond a reasonable doubt.

CONCLUSION

The decision of the Supreme Court of Missouri should be affirmed.

Respectfully submitted,

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CARMAN L. DECK,

Petitioner,

v.

STATE OF MISSOURI,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Missouri

PETITIONER'S REPLY BRIEF

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REPLY BRIEF FOR PETITIONER

I. The State's theory that the shackling of a convicted capital defendant is not inherently prejudicial because it communicates nothing more than a jury would expect ignores the inherent risk of prejudice that such measures carry and that has influenced many of the Eighth Amendment safeguards the Court has found necessary in capital sentencing proceedings.

The foundation of the State's argument, repeated throughout its brief and undergirding virtually every other point it makes, is that jurors could not be influenced negatively after observing a defendant restrained in legirons and handcuffed to a belly chain during his capital sentencing trial (Resp. Br. at 12, 17, 23-24, 28, 29, 32, 42). Its theory is that jurors would expect someone convicted of murder to be physically restrained (Resp. Br. at 12, 17, 23-24, 28, 29, 32, 42). The State argues that, because the jury would expect a dangerous person to be restrained, and the defendant is presumptively dangerous, the restraints do not change the jurors' attitudes toward the defendant. Under this theory, the restraints do not mislead the jury, the sentencing is reliable, and the Eighth and Fourteenth Amendments are satisfied.

The State argues that "restraints in penalty phase simply reflect what the jurors already know: that the defendant has been convicted" (Resp. Br. 23). The State contends: "That a person convicted of two vicious murders would be physically restrained in some way could hardly come as a shock. . . . [I]t would be the naïve juror indeed who thought that Deck was wandering the streets in the years intervening" (Resp. Br. 24). Because the jurors knew

that Deck was in custody, "[a]ny restraint . . . was nothing more than a predictable manifestation of what was already fairly obvious" (Resp. Br. 24). As a result, the State contends, the restraints could not have misled any juror (Resp. Br. 24).[1]

The State's argument proves too much. Under this theory, physically restraining a defendant in the guilt phase would be perfectly permissible too, as long as the jurors would expect the defendant to be in custody. Thus, defendants in the guilt phase facing murder charges or charges for other violent crimes could be visibly, physically restrained to any degree the trial court wished without the exercise of any discretion. After all, jurors would expect that those defendants would not be "wandering the streets" prior to trial, and the restraints would be a mere "manifestation of what was already fairly obvious," that the defendant was in custody (Resp. Br. 24). Under the State's argument, the defendants in *Holbrook v. Flynn*, 475 U.S. 560 (1986) – charged with a large-scale armed

[1] Maryland's highest court rejected this argument in *Lovell v. State*, 347 Md. 623, 647, 702 A.2d 261, 273 (Md. 1997), as did the Ninth Circuit in *Duckett v. Godinez*, 67 F.3d 734, 748, 749 (9th Cir. 1995), *cert. denied*, 517 U.S. 1158 (1996). The Ninth Circuit held that there was no error in requiring the defendant to wear prison clothing in the penalty phase, because the jury would know that he was convicted. *Id.* at 747. In contrast, it was error for the defendant to be shackled in the penalty phase, since shackling was an inherently prejudicial practice that communicated that the defendant was dangerous and violent. *Id.* at 748.

Restraints do in fact mislead jurors in capital sentencing trials. *See* Pet. Br. at 30-34; *see also Marquez v. Collins*, 11 F.3d 1241, 1243-44 (5th Cir.), *cert. denied*, 513 U.S. 881 (1994) ("Shackling [in the penalty phase] carries the message that the state and the judge think the defendant is dangerous, even in the courtroom. . . . Restraint at trial may carry a message that a defendant continues to be dangerous.").

robbery and held without bail – could have been tried in handcuffs and legirons, since the jury would have expected them to be in custody. The State's argument thus conflicts sharply with this Court's instruction in *Holbrook* that shackling a defendant is an "inherently prejudicial practice . . . that . . . should be permitted only where justified by an essential state interest specific to each trial." *Id.* at 568-69.

Respondent argues that, unless restraints "inevitably and exclusively [lead] to the conclusion that the defendant is dangerous," they are not misleading to the jury and thus do not violate the Eighth and Fourteenth Amendments (Resp. Br. 24). This argument is in stark contrast to this Court's decisions. Traditionally, this Court has not forced defendants to show that a courtroom procedure did in fact produce his unwarranted death sentence, but rather, that the procedure created an undue risk of an unwarranted death sentence. In *Lockett v. Ohio*, 438 U.S. 586, 608 (1978), the Court struck down a statute that prevented the sentencer from considering aspects of the defendant's background and character because the statute "create[d] the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." *Id.* at 605.

The Court continued its emphasis on the *risk* of an impermissible result in *Beck v. Alabama*, 447 U.S. 625 (1980). Under Alabama law, the jury was unable to consider lesser included offenses to first degree murder. *Id.* at 628. The Court held that when the evidence shows that the defendant has committed a serious, violent crime, but not necessarily capital murder, "the failure to give the jury

the 'third option' of convicting on a lesser included offense would seem inevitably to enhance the risk of an unwarranted conviction. Such a risk cannot be tolerated in a case in which the defendant's life is at stake." *Id.* at 637.

In *Eddings v. Oklahoma*, 455 U.S. 104, 113-14 (1982), this Court remanded because the trial court had incorrectly believed that it could not consider certain mitigating evidence as a matter of law. In her concurring opinion, Justice O'Connor stressed that the Court "has gone to extraordinary measures to ensure that the prisoner sentenced to be executed is afforded process that will guarantee, as much as is humanly possible, that the sentence was not imposed out of whim, passion, prejudice, or mistake." *Id.* at 118. To this end, a remand for resentencing was warranted since "the trial court's failure to consider all of the mitigating evidence risks erroneous imposition of the death sentence." *Id.* at 117, n.*.

In *Lankford v. Idaho*, 500 U.S. 110, 125-27 (1991), this Court reversed, holding that the defendant's due process rights were violated because he did not receive adequate notice that his sentencing hearing could result in the death penalty. Writing for the Court, Justice Stevens emphasized that, without proper notice, there is "an increased *chance* of error . . . and with that, the *possibility* of an incorrect result." *Id.* at 127 (emphasis added). The lack of notice "created an impermissible *risk* that the adversary process may have malfunctioned in this case." *Id.* (emphasis added).

Furthermore, the State incorrectly limits this Court's cases when it argues that "[i]n considering the reliability of sentencing decisions under the Eighth Amendment, this Court has focused on whether the sentencer has been

given inaccurate or misleading information" (Resp. Br. 20). This Court has found other grounds of penalty-phase error under the Eighth Amendment, the common denominator being that the procedure created the risk of an unwarranted death sentence. For example, in *Sochor v. Florida*, 504 U.S. 527, 532 (1992), the Eighth Amendment violation had nothing to do with whether the sentencer was misled. There, the violation consisted of the trial court's finding of an aggravator that was unsupported by the evidence, among the four statutory aggravating circumstances cited in its decision to impose a death sentence. *Id.* at 539. Again, the emphasis was on the risk of an unwarranted death sentence. Writing for the Court, Justice Souter stressed that consideration of an invalid aggravating circumstance in the weighing process "'creates the possibility . . . of randomness' by placing a 'thumb [on] death's side of the scale,' thus 'creat[ing] the risk [of] treat[ing] the defendant as more deserving of the death penalty.'" *Id.* at 532, quoting *Stringer v. Black*, 503 U.S. 222, 232, 235-36 (1992).

In *Tuggle v. Netherland*, 516 U.S. 10, 13 (1995), the petitioner was prevented from developing his own psychiatric evidence to rebut the State's psychiatric testimony of the petitioner's future dangerousness. The jury found the two aggravating circumstances permitted under Virginia law: vileness and future dangerousness. *Id.* at 11. The Virginia Supreme Court invalidated the future dangerousness aggravator, but upheld the death sentence based on the vileness aggravator. *Id.* at 12. Even assuming that the petitioner's psychiatric evidence would not have influenced the jury regarding the vileness aggravator, "the absence of such evidence *may well* have affected the jury's

ultimate decision . . . to sentence petitioner to death." *Id.* at 14 (emphasis added).

The State misconstrues *Gardner v. Florida*, 430 U.S. 349 (1977), in arguing that the Court's focus was solely on whether the information considered by the sentencer was erroneous or inaccurate (Resp. Br. 22). The Court held that the death sentence violated the defendant's rights under the Fourteenth Amendment's Due Process Clause, because the death sentence "was imposed, at least in part, on the basis of information which [the defendant] had no opportunity to deny or explain." *Id.* at 362. The information in the confidential material may or may not have changed the result – the Court explicitly refused to examine the confidential material, *id.* at 354, n.5, but knew that the trial court's findings did not indicate that this material contained anything of special importance. *Id.* at 354, 362. Even so, a new sentencing proceeding was warranted because of the "possibility" that full disclosure, followed by argument of counsel, would have changed the result at trial. *Id.* at 362.

The Court described the *Gardner* ruling in *California v. Ramos*, 463 U.S. 992, 1004 (1983), by saying: "Because of the potential that the sentencer might have rested its decision in part on erroneous or inaccurate information that the defendant had no opportunity to explain or deny, the need for reliability in capital sentencing dictated that the death penalty be reversed." The State's brief unwarrantedly adds typographical emphasis to the words "erroneous or inaccurate" in this passage (Resp. Br. 22), for it is clear from any fair reading of *Gardner* that the apt emphasis should be on the words "potential" and "might have."

II. The State's proffered plan is grossly inefficient and fails to address all the problems caused by physical restraints.

The State urges this Court to scrap the familiar procedure established in *Illinois v. Allen*, 397 U.S. 337 (1970), *Estelle v. Williams*, 425 U.S. 501 (1976), and *Holbrook v. Flynn*, 475 U.S. 560 (1986), when it comes to the penalty phase. It urges, instead, that the Court adopt the following procedure:

> The now-convicted defendant should be required to not just object, but to follow up by creating a record, including presenting evidence if necessary, of what the jurors could and could not see, hear, or otherwise perceive regarding the defendant's restraints; the defendant would then have the opportunity to contest the need for the restraints by disputing the basis for that decision.

(Resp. Br. 34).

Under the State's plan, the defendant would presumptively begin the penalty phase of the trial shackled, because of his conviction for first-degree murder, regardless of whether shackling was necessary in the individual case. Defense counsel would then need to prove to the court that at some time during the proceedings the shackles could be seen or heard by the jury. Only then would defense counsel be entitled to inquire into the justifications (if any, other than the defendant's conviction) for the restraints, and to challenge their sufficiency.

The State's proposal defies belief. Trials would have to be interrupted for evidentiary hearings into shackling issues at any point during evidence-taking or argument when defense attorneys – who have other things to attend

to in the courtroom as well – believe that they have observed something which suggests to them that jurors may have seen or heard the defendant's restraints. In most cases, presumably, the jurors themselves would then have to be questioned, individually or as a group. Group questioning would risk that jurors who had not initially perceived the restraints now would know of them. Individual questioning would be time-consuming and would raise speculation among other jurors. Jurors, attempting to figure out what was unusual or troublesome in the courtroom, would be distracted from the testimony coming from the stand. To make matters worse, this scenario could occur repeatedly throughout the trial, whenever a new occasion arises on which jurors may have caught a glimpse of what is going on behind or under the defense table. And whenever it was found that a juror had seen or heard the defendant's restraints, to the defendant's prejudice, the judge would be obliged to take remedial measures after the fact, surely including a mistrial in at least some cases. Under this scenario, a trial could be almost completed when a juror happens to observe the defendant's restraints; prejudice to the defendant could appear when the juror is questioned; and at this point, when the justification for the restraints is finally examined, it may turn out that there never was any (other than the defendant's conviction) in the first place. Whether a mistrial is consequently granted or not, the result is bound to be equally unfortunate and unnecessary.

Manifestly, this makes far less sense than simply applying the familiar *Allen*, *Estelle* and *Holbrook* standard to the penalty phase. That standard has been utilized for decades in both guilt and penalty phases; it is workable and effective. It is a prophylactic standard, ensuring that

the defendant will not be exposed to prejudicial practices and that trials will not be set at risk of mistrials unless necessary. Before physical restraints may be imposed, the State must demonstrate that there is a need to shackle the defendant to further an essential state interest specific to the case at bar, and that lesser measures would not suffice to meet that interest. *Allen*, 397 U.S. at 344; *Estelle*, 425 U.S. at 505; *Holbrook*, 475 U.S. at 568-69. This standard allows the court discretion while balancing the defendant's right to a fair trial with the State's competing interests in courtroom security.

Furthermore, the State's proposal is faulty because it rests entirely on the proposition that the sole detriment arising from the use of restraints is that the jury will notice them. It fails to deal with the limitations that restraints impose on the defendant's ability to communicate with counsel and participate in his defense, or how restraints can degrade the dignity of the courtroom.

III. The State, having remained silent in the face of defense counsel's repeated assertions that the jury could view the restraints, now cannot seek refuge behind a claim that the record is too slim.

The State faults defense counsel for failing to make a fuller record regarding the visibility of the physical restraints (Resp. Br. 34-37). It argues that there was no evidence in the record that the jurors noticed the restraints until defense counsel mentioned them to the jury (Resp. Br. 34-35). The record does not support the State's argument.

The trial commenced when the court read instructions to the 150-member venire panel and questioned them regarding publicity and whether any of them had a hardship that would excuse them from jury service (Tr. 1-12; L.F. 195-98). Deck was present during this questioning (Tr. 1). The court then declared a recess and convened to chambers with the parties to question individual venire persons (Tr. 12-74). Defense counsel objected to the physical restraints, noting that they "prejudice[ ] [Deck] towards the jury and make[] him look dangerous" (J.A. 57-58). Neither the prosecutor nor the court denied that the restraints were visible to the jury. Instead, the court summarily responded, "[t]he objection that you're making will be overruled. He has been convicted and will remain in legirons and a belly chain" (J.A. 58). The court and parties returned to the courtroom, where the court again instructed the venirepanel, and noon recess was taken (Tr. 75). After lunch, the prosecutor questioned the panel, followed by another recess (Tr. 75-140). Defense counsel, far into his questioning in *voir dire*, stated, "[t]he other thing about Carman that you all either do or will know is that there's chains on him" (J.A. 58).

Defense counsel would not have mentioned the restraints unless they were, in fact, visible to the jurors. Defense counsel would not want the jurors to see Deck in restraints and would not bring them to the jury's attention unless it was clear that the jury had already noticed them or would inevitably notice them. The record shows that, by the time defense counsel mentioned the restraints, Deck had been in open court – in legirons and a belly chain – with the jurors for (1) opening instruction and questioning

of the large group; (2) when three recesses were declared;[2] and (3) during all of the prosecutor's questioning in *voir dire* and a large chunk of defense counsel's questioning.

The court itself acknowledged that the shackles were visible. When defense counsel moved to strike the panel due to the restraints, she argued that the restraints would put the jurors in fear of Deck and make them think that he would do something in court or to the jurors (J.A. 58-59). The court's response – that the shackles take any fear out of the jurors' minds – implicitly acknowledged that the restraints were visible to the jurors (J.A. 58). Certainly, if the restraints were not visible, the judge or the prosecutor would have taken that opportunity to so state. *See, by analogy, United States v. Hale*, 422 U.S. 171, 176 (1975) ("Silence gains more probative weight where it persists in the face of accusation, since it is assumed in such circumstances that the accused would be more likely than not to dispute an untrue accusation.").

The State cannot now fault the defendant for failing to make more of a record when the State remained silent in the face of defense counsels' numerous assertions that the restraints prejudiced Deck, *i.e.*, were visible. An analogous situation arose in *Lee v. Kemna*, 534 U.S. 362 (2002). In *Lee*, defense counsel orally moved for a short continuance after he was unable to locate three crucial defense witnesses. *Id.* at 369. The judge denied the continuance because he had a personal commitment the next day and another trial starting the day after. *Id.* at 370. The defendant was convicted. *Id.* at 371. On appeal,

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[2] It is common etiquette in Missouri courtrooms for everyone in the courtroom to stand when the jury and/or judge enter or leave the courtroom.

the State argued for the first time that the motion for continuance had a fatal procedural flaw. *Id.* The Missouri Court of Appeals affirmed, faulting the motion for not being in written form and for lacking a factual showing, neither of which were raised by the State at trial. *Id.* at 372-73.

This Court held that Lee's federal claim could be considered on the merits. *Id.* at 386. It stressed that neither the prosecutor nor the court brought the alleged defects to defense counsel's attention at the time the motion was made, and that defense counsel had given the court all the information it needed to make an intelligent ruling on the merits of the motion. *Id.* at 366.

As in *Lee,* the State cannot benefit from a defect that it in fact helped to create. Deck's attorneys adequately brought to the court's and the prosecutor's attention that the jury could see that Deck was shackled and handcuffed (J.A. 57-59). In response, the prosecutor said nothing. The court, too, did not deny that the restraints were visible. Instead, it declared that because Deck was convicted, he would remain in legirons and handcuffs (J.A. 58) and further opined that the restraints would make the jurors feel more secure (J.A. 59). By failing to refute counsel's assertions at trial -- and as to the court, actually agreeing with them – the State has waived any alleged defect in the record.

IV. Trial courts must have discretion to employ courtroom security. The problem is that, here, the court did not exercise the discretion mandated by this Court in *Allen*, *Estelle*, and *Holbrook*.

The State repeatedly emphasizes that trial courts must have discretion to impose courtroom security procedures

(Resp. Br. 11, 13, 19). We agree – indisputably, trial courts must have discretion to maintain the security of the courtroom. This Court's *Allen/Estelle/Holbrook* standard was carefully tailored to provide that discretion while, at the same time, providing trial judges with a solid constitutional framework for its exercise. Recognizing the extreme danger that physical restraints pose to the defendant's constitutional rights, this Court has instructed that, before a trial court can impose restraints, it must assess (1) whether the State has established that the restraints further an essential state interest specific to the trial; and (2) whether there are less restrictive, less prejudicial alternatives that could meet that interest. *Allen*, 397 U.S. at 344; *Estelle*, 425 U.S. at 505; *Holbrook*, 475 U.S. at 568-69. Deck's case is before this Court because the trial judge imposed restraints automatically for no other reason than his belief that Deck's status as a convicted capital offender called for them. He exercised no discretion, made no inquiry into any case-specific state interests justifying restraints, and *a fortiori* made no efforts to accommodate any state interest that might exist with Deck's interest in receiving a fair penalty trial, or to consider less restrictive alternatives to shackling. The State's purported reliance upon the need for judicial discretion is disingenuous when the State's position in this case is and must be to seek approval of the trial court's failure to exercise any discretion whatsoever.

CONCLUSION

For the foregoing reasons, as well as the reasons set forth in the Brief of Petitioner, the Court should reverse the judgment of the Missouri Supreme Court and remand for a new sentencing trial.

Respectfully submitted,

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In The Supreme Court of the United States

CARMAN L. DECK,

Petitioner,

v.

STATE OF MISSOURI,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Missouri

AMICUS CURIAE BRIEF OF THE BAR HUMAN RIGHTS COMMITTEE OF ENGLAND AND WALES; *AMICUS*; and the NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF THE PETITIONER

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RELEVANT CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the U.S. Constitution provides in relevant part: "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law;"

The Sixth Amendment to the U.S. Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him;"

The Eighth Amendment to the U.S. Constitution provides in relevant part: "[N]or cruel and unusual punishments inflicted."

The Fourteenth Amendment to the U.S. Constitution provides in relevant part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., Amend. XIV, § 1.

INTEREST OF *AMICI CURIAE*

The Bar Human Rights Committee, *Amicus*, and the National Association of Criminal Defense Lawyers (NACDL), hereby request that this Court consider the present brief pursuant to Rule 37.2(a) in support of Petitioner Carman L. Deck.[1]

The Bar Human Rights Committee is the international human rights arm of the Bar of England and Wales. The Committee regularly appears in cases where there are matters of human rights concern, and has experience of legal systems throughout the world. The BHRC has previously appeared as *amicus curiae* before the United States Supreme Court.

Amicus is a U.K. charity, which aims to train U.K. lawyers to provide assistance for U.S. death penalty attorneys by undertaking internships, in the provision of briefs of *amicus curiae*, preparing clemency petitions, undertaking research and making applications to the Inter-American Commission of Human Rights. *Amicus* runs an educational program which has included senior judges, academics and practitioners from the U.S. and around the world. "Amicus" has also previously appeared as *amicus curiae* before the U.S. Supreme Court.

National Association of Criminal Defense Lawyers (NACDL) works domestically and internationally to ensure justice and due process for persons accused of

[1] Letters from both counsel consenting to the filing of this brief have been filed with the Clerk of the Court. Counsel for neither party authored this brief in whole or in part. No person or entity, other than the *Amici Curiae*, their members, or their counsel made a monetary contribution to the preparation and submission of the brief.

crime; to foster the integrity, independence and expertise of the criminal defense profession; and to promote the proper and fair administration of criminal justice. NACDL has appeared as *amicus curiae* numerous times before this Court.

SUMMARY OF ARGUMENT

The practices of other common law countries, civilized nations and the provisions of international treaties to which the United States is a signatory may inform this court's interpretation of what processes should be applied to a defendant during the penalty phase of a capital trial. Common law, international law and convention require that all defendants be treated with a dignity that is commensurate to the overriding and abiding presumption of innocence during their trials and axiomatically to their trials in a penalty phase before a jury. The courtroom is the legal and social center in which due process and procedure abide, and the absence of procedural conduct maintaining dignity and respect for all of the parties and participants denigrates that legal and social foundation.

Absent threatening or improper behavior by the defendant, due process requires that a defendant normally be free of restraints at *all* stages of his trial. Improper restraints on a defendant during penalty phase denies him the due process required by the Fifth Amendment, compels him to, in essence, give testimony against himself contrary to the Fifth Amendment, effectively denies him the opportunity to confront himself as witness against himself in contravention of the Sixth Amendment and constitutes degrading treatment of the defendant.

A number of states count "future dangerousness" among their capital sentencing statute's aggravating circumstances. The sight of a defendant in ostentatious restraints cannot but unduly influence the jury's assessment to the defendant's detriment. Additionally, research shows that "future dangerousness" is always on the minds of jurors and is, thus, at issue in most trials. Improper restraint of a defendant during penalty phase proceedings fatally taints this process.

Absent a compelling State reason to restrain a defendant, restraint at any stage of a trial is a serious constitutional violation and cannot be condoned.

ARGUMENT

I. The common law, the practice of other nations, and international law are proper considerations with which to assess evolving standards of decency and the requirements of due process.

To ascertain the requirements of due process and the meaning of the constitutional bar on cruel and unusual punishment, it is permissible to look to other jurisdictions. "*'There is no doubt' that Section 10 of the English Bill of Rights of 1689 'is the antecedent' of the cruel and unusual punishment clause of our Eighth Amendment.*"[2] The historical evolution of common law can assist the Court: *Ford v. Wainwright*, 477 U.S. 399, 406 (1986). The influence

[2] *McKenzie v. Day*, 57 F.3d 1461, 1487 n.18 (9th Cir. 1995) (William A. Norris, dissenting) citing *Harmelin v. Michigan*, 501 U.S. 957, 966 (1991) (Scalia J., concurring).

of the international custom of Western European countries, countries with an Anglo-American culture and human rights treaties have all been recognized as of significance, *Thompson v. Oklahoma*, 487 U.S. 815, 830 (1988). The Supreme Court has held that the practice in other "*civilized nations of the world*" is a relevant consideration, *Trop v. Dulles*, 356 U.S. 86, 102 (1958), as are standards in other jurisdictions, *Enmund v. Florida*, 458 U.S. 782, 796 (1982), in deciding what amounts to cruel and unusual punishment.

Recently, this Court has recognized the value of common law decisions from the international community in determining the contours of the Eighth Amendment's "cruel and unusual punishment" clause. *See, e.g., Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002) (considering international community's rejection of the death penalty for persons with mental retardation). Likewise, this Court has recognized the relevance of international norms when considering the permissibility of practices in this country. *See, e.g., Lawrence v. Texas*, 539 U.S. 558, 123 S. Ct. 2472, 2483 (2003) (noting that "the right [of adults to engage in intimate, consensual conduct] has been accepted as an integral part of human freedom in many other countries"); *Grutter v. Bollinger*, 539 U.S. 306, 344 (2003) (Ginsburg, J. concurring) (noting support for affirmative action policies in international law).

International norms play a part in the ongoing growth of common law. The Judicial Committee of the Privy Council has commented that:

> *"In considering what natural justice requires, it is relevant to have regard to international human rights norms set out in treaties to which the state is a party whether or not those are independently enforceable in domestic law."*

Lewis v. Attorney General of Jamaica, [2001] 2 A.C. 50, 80.

These concepts should therefore be used in order to assist the Court in deciding whether exhibiting a defendant in restraints during the sentencing phase of his trial amounts to a denial of due process, a cruel and unusual punishment and a fundamental breach of his civil liberties.

In *Trop v. Dulles*, 356 U.S. at 100-01, the Supreme Court proposed a standard for interpreting the phrase "*cruel and unusual*" and thus whether a punishment was proscribed by the Eighth Amendment.

> *"The basic concept underlying the Eighth Amendment prohibition is nothing less than the dignity of man. While the state has power to punish, the [clause] stands to assure that this power be exercised within the limits of civilized standards."*

Id. at 100.

The Court opined that the Eighth Amendment "*must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.*" *Id.* at 101.

The importance of the continuing development of fundamental standards is emphasized in other common law jurisdictions. In the case of *Fisher v. Minister of Public Safety and Immigration (No. 1)*, [1998] A.C. 673, at 686, Lord Steyn commented that:

> *"The innate capacity of different areas of law to develop varies. Thus the law of conveyancing is singularly impervious to change. But constitutional law governing the unnecessary and avoidable prolongation of the agony of a man sentenced*

> *to die by hanging is at the other extreme. The law governing such cases is in transition."*

The European Court of Human Rights refers to the European Convention on Human Rights as being a "*living instrument*" when considering the prohibition on inhuman or degrading treatment or punishment in Article 3, *see Soering v. United Kingdom* (*A/161*), 11 E.H.R.R. 439.

II. Due Process requires that trials be conducted so as to respect the dignity of the court and of the parties.

Missouri's stated reasons for restraining Petitioner during his capital trial resentencing phase were *quia timet* precautions. It argued that Petitioner's case "*presented security concerns not present in other penalty phase proceedings.*" Mo. Sup. Ct. Br. of Resp. at 9. The U.S. Supreme Court has upheld the right of judges, when "*confronted with disruptive, contumacious, stubbornly defiant defendants,*" to take necessary steps to meet the circumstances of each case, *Illinois v. Allen*, 397 U.S. 337, 343 (1970). Missouri implies that Petitioner's conviction for capital murder is prima facie evidence that satisfies *Allen* and thus entitles the State to restrain Petitioner during penalty phase proceedings although insufficient to restrain him during guilt phase proceedings. This is misconceived and replete with irony.

Misleadingly, Missouri characterizes Petitioner's argument as "*grounded on the presumption of innocence.*" Mo. Sup. Ct. Br. of Resp. at 11. Petitioner makes no such claim but rather points out that this court's reasoning in *Allen* made no mention of the presumption of innocence as a basis for its decision. Mo. Sup. Ct. Br. of Pet. at 6. Petitioner's

arguments are primarily founded in Missouri's alleged violations of the Fifth Amendment's prohibition against compelled self-incrimination, the Sixth Amendment's Confrontation Clause and the Fourteenth Amendment's Equal Protection Clause. Mo. Sup. Ct. Br. of Pet. *passim*.

Amici propose an alternative analysis supporting Petitioner. Missouri failed to accord Petitioner, during the resentencing phase of his trial, the dignity and respect that, absent contumacious or violent behavior, common law due process affords all defendants throughout their trials. In *Allen*, Justice Black stated that "*to contemplate such a technique, much less see it, arouses a feeling that no person should be tried while shackled and gagged except as a last resort*" and that "*use of this technique is itself something of an affront to the very dignity and decorum of judicial proceedings that the judge is seeking to uphold.*" *Id.* at 344. While the restraints employed in the present case were less incapacitating than those described in *Allen*, nevertheless the sight of an orderly defendant wearing shackles and a belly chain in a trial is unnecessarily demeaning, degrading and immeasurably prejudicial to the defendant.

The position at common law in England and Wales is broadly similar to that described in *Allen*:

> *"As to whether or how a defendant is to be restrained during his trial is a matter which falls within the judge's discretion but the principle in general must be that unless there is danger of escape or violence the defendant ought not to be handcuffed or otherwise restrained in the dock or, it goes without saying, in the witness box. (See R -v- Vratsides (1998) CLR 251) Usually there are other means of protecting the public and preventing*

escape which involve less risk of prejudice to a defendant."

R. v. Mullen (Thomas); R. v. Mustapha, No. 9800906X5 & 9801555X5 (C.A. (C.D.) May 5, 2000) (available on Westlaw as 2000 WL 571186) at para 26.

The disquiet felt by Justice Black in *Allen* is of the kind that would lead an English court to apply the 'safety test' propounded by Widgery LJ:

> *"It has been said over and over again throughout the years that this court must recognise the advantage which a jury has in seeing and hearing the witnesses, and if all the material was before the jury and the summing-up was impeccable, this court should not lightly interfere.*
>
> *[W]e are [. . .] charged to allow an appeal against conviction if we think that the verdict of the jury should be set aside on the ground that under all the circumstances of the case it is unsafe or unsatisfactory. That means that in cases of this kind the court must in the end ask itself a subjective question, whether we are content to let the matter stand as it is, or whether there is not some lurking doubt in our minds which makes us wonder whether an injustice has been done. This is a reaction which may not be based strictly on the evidence as such; it is a reaction which can be produced by the general feel of the case as the court experiences it."*

R. v. Cooper (Sean), [1969] 1 Q.B. 267, 271.

Absent disorderly or violent behaviour, Petitioner is entitled to be treated in the courtroom with the inherent dignity and respect to which all persons are entitled. The United States has recognized such entitlement in the

declarations of human rights and conventions whose proclamations and agreements it has joined. See, for example, the preamble to the Universal Declaration of Human Rights:

> *"Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world."*

Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., pt.1, U.N. Doc. A/810 at 71 (1948). See also article 2(1) of the International Covenant on Civil and Political Rights requiring that:

> *"Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind . . . ".*

And article 7 agreeing that

> *"No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. . . . ".*

International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966). Finally the United States has also ratified the Convention Against Torture. Article 16(1) provides:

> *"Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or*

acquiescence of a public official or other person acting in an official capacity. . . . ".

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, [Annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984)].

The meaning of the phrase "*degrading treatment*" in article 3 of the European Convention on Human Rights has been considered by the European Court of Human Rights in a number of cases. In *Mouisel v. France (67263/01)*, (2004) 38 E.H.R.R. 34, the court had to consider whether the use of restraints applied to a convicted armed robber during medical treatment in hospital amounted to degrading treatment. In holding unanimously that such treatment breached article 3, the Court reiterated that:

> *"According to its case law, ill-treatment must attain a minimum level of severity if it is to fall within the scope of Art.3 of the Convention. The assessment of this minimum level is, in the nature of things, relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim. . . . Although the purpose of such treatment is a factor to be taken into account, in particular whether it was intended to humiliate or debase the victim, the absence of any such purpose does not inevitably lead to a finding that there has been no violation of Art.3. . . . "*

Id. at para. 37.

In *Raninen v. Finland (20972/92)*, (1998) 26 E.H.R.R. 563 the court had to consider whether handcuffing in

public a Finnish national, arrested for avoiding military service, amounted to degrading treatment in breach of article 3:

> *" . . . Article 3 of the Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment, irrespective of the victim's conduct. In order to fall within the scope of Article 3, the ill treatment must attain a minimum level of severity, the assessment of which depends on all the circumstances of the case . . . Furthermore, in considering whether a punishment or treatment is "degrading" within the meaning of Article 3, the Court will have regard to whether its object is to humiliate and debase the person concerned and whether, as far as the consequences are concerned, it adversely affected his or her personality in a manner incompatible with Article 3. . . . In this connection, the public nature of the punishment or treatment may be a relevant factor. At the same time, it should be recalled, the absence of publicity will not necessarily prevent a given treatment from falling into that category: it may well suffice that the victim is humiliated in his or her own eyes, even if not in the eyes of others."*

Id. at 587-8.

A reading of *Mouisel* and *Raninen* shows that the European Court of Human Rights will find degrading treatment in breach of the Convention in cases where the degrading treatment has fallen well short of physical maltreatment but where the degradation has been compounded by its public exhibition.

In *Namunjepo & Ors v. The Commanding Officer, Windhoek Prison & Anor*, 2000 (6) BCLR 671 (NmS)

available as 1999 SACLR LEXIS 96, the court had to consider whether the placing of five prisoners in chains was an infringement of their constitutional rights to dignity and whether their rights to be free from torture, cruel, inhuman or degrading treatment or punishment had been violated.

> *"Whatever the circumstances the practice of using chains and leg irons on human beings is a humiliating experience which reduces the person placed in irons to the level of a hobbled animal whose mobility is limited so that it cannot stray*
>
> * * *
>
> *I am therefore of the opinion that the placing of a prisoner in leg irons or chains is an impermissible invasion of article 8(1) and contrary to article 8(2)(b) of the Constitution as it at least constitutes degrading treatment."*

Namunjepo & Ors v. The Commanding Officer, Windhoek Prison & Anor 2000 (6) BCLR 671 (NmS) available as 1999 SACLR LEXIS 96 at 37-8.

In *Blanchard & Ors v. Minister of Justice, Legal and Parliamentary Affairs & Anor,* [1999] ICHRL 108 URL: http://www.worldlii.org/int/cases/ICHRL/1999/108.html, a Zimbabwean court in considering the International Covenant on Civil and Political Rights (ICCPR), 1966 and Art 7 United Nations Standard Minimum Rules for the Treatment of Prisoners, rls 87, 88(1), ruled that the use by prison authorities of leg-irons and handcuffs, except for the prevention of escape during transportation or to restrain violent behavior in the absence of other effective methods, was condemned. Although persons in custody do not possess the full range of freedoms as unincarcerated

individuals, any restraints imposed upon them must be circumscribed and absolutely necessary.

Missouri's treatment of Petitioner was public, degrading and served no compelling State purpose in the circumstances of this case. *Amici* urge the Court to find that Missouri failed to afford Petitioner that due process required by the international interpretation of the common law and Fifth and Fourteenth Amendments of the Bill of Rights.

III. Unwarranted restraint of a capital defendant during the penalty phase of trial constitutes compelled self-incrimination and inability to confront a witness against him.

Article 6 of the European Convention on Human Rights and the Human Rights Act 1998 guarantee the right to a fair trial. According to *Moreira de Azevedo v. Portugal (A/189)*, (1991) 13 E.H.R.R. 721 at paragraph 65, this is to be given a broad and purposive interpretation. The right to a fair trial includes *"the right of anyone charged with a criminal offence . . . to remain silent and not to contribute to incriminating himself."* In *Saunders v. United Kingdom (19187/91)*, (1997) 23 E.H.R.R. 313 at 334, the European Court of Human Rights described the right to silence and the right not to incriminate oneself as a generally recognized international standard that lay at the heart of a notion of fair procedure under Article 6. The latter right presupposed that the prosecution in a criminal case must prove its case without resort to evidence obtained through methods of coercion and oppression in defiance of the will of the accused. In this sense, the privilege against self-incrimination was *"closely linked"* to the presumption of innocence. See *I J L v. United Kingdom (29522/95)*, (2001) 33 E.H.R.R. 11, and *Serves v. France*

(20225/92), (1999) 28 E.H.R.R. 265, *Condron v. United Kingdom (35718/97)*, (2001) 31 E.H.R.R. 1.

Article 6(2) guarantees the presumption of innocence in criminal proceedings. Pre-trial publicity involving statements by police officers or other public officials to the effect that an accused person is guilty of an offense with which he is charged may amount to a violation of Article 6(2) (*Allenet de Ribemont v. France (A/308)*, (1995) 20 E.H.R.R. 557). The appearance of Petitioner in chains speaks as loudly to the minds of a jury as the words of police officials, witnesses and media reports.

American authorities are in accord with these international norms. The Fifth Amendment as applied to the States by the Fourteenth Amendment requires that no person shall be compelled in any criminal case to be a witness against himself. Although during the sentencing phase the defendant no longer enjoys the presumption of innocence, there are still other issues to be tried between him and the State. During that phase the defendant should retain all other common law due protections as long as there are issues to be tried.

This court has said that *"[u]nder the capital sentencing laws of most States, the jury is required during the sentencing phase to find at least one aggravating circumstance before it may impose death. . . . By doing so, the jury narrows the class of persons eligible for the death penalty according to an objective legislative definition."* Rehnquist CJ in *Lowenfield v. Phelps*, 484 U.S. 231, 244 (1988). The sentencing phase of a capital trial is accordingly a fact-finding process where evidence is weighed by the jury and presumptions in favor of the defendant must be overcome by jury determination.

This Court has recognized the independent importance of the jury in the sentencing phase and their necessity to determine the factual issues during penalty that can result in a death verdict. The penalty process is afforded Constitutional protections. In *Ring v. Arizona*, 536 U.S. 584 (2002), this Court stated that *"[I]f a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt."* *Id.* at 602. The jury's role and right to determine that death is the appropriate punishment, beyond a reasonable doubt, cannot be diminished by the State's use of shackling to create an image of dangerousness as a tactic to inflame their passions.

> *"The same dictates of text and policy that ensure that a criminal defendant may be deprived of his or her liberty only after the prosecution has overcome the presumption of innocence at trial apply with equal, if not greater, force to require that the prosecution overcome the presumption of life in a capital sentencing proceeding before a defendant can be put to death."*

Note, *The Presumption of Life: A Starting Point for a Due Process Analysis of Capital Sentencing*, 94 Yale L.J. 351 at 360 (1984) (Beth S. Brinkmann)

Six States have capital sentencing schemes where the jury must or may find the defendant to be a future danger to the public if he is to be placed in the narrower class of defendants eligible for the death penalty. In Texas one of the statutory questions for the jury is *"whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society"* (Vernon's Ann.Texas C.C.P. Art. 37.071).

In other States statutory aggravators include: whether *"[t]he defendant, by prior conduct or conduct in the commission of the murder at hand, has exhibited a propensity to commit murder which will probably constitute a continuing threat to society"* (Idaho Statute § 19-2515); in Oklahoma, whether *"[t]he existence of a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society"* (21 Okl.St.Ann. § 701.12); in Oregon, one of the issues to be submitted to the jury is *"Whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society"* (O.R.S. § 163.150); in Virginia, *"[t]he penalty of death shall not be imposed unless the Commonwealth shall prove beyond a reasonable doubt that there is a probability . . . [that the accused] would commit criminal acts of violence that would constitute a continuing serious threat to society"* (Va. Code Ann. § 19.2-264.4); and in Wyoming aggravators include an assessment whether *"[t]he defendant poses a substantial and continuing threat of future dangerousness or is likely to commit continued acts of criminal violence"* (W.S.1977 § 6-2-102).

When a jury is charged upon oath with making a determination such as those above, it cannot help but notice if the state finds it necessary to restrain the defendant in the courtroom. Jurors might well conclude, consciously or subconsciously, that the explanation or one of the explanations for such restraint is that the defendant is presently dangerous. In such circumstances the defendant can be said to have been compelled to provide mute testimony against himself.

Such a practice is manifestly unjust and unconstitutional in the jurisdictions mentioned. However, even in

those jurisdictions where there is no explicit requirement for jurors to find future dangerousness, empirical research conducted by the Capital Jury Project has shown that dangerousness is always on the minds of capital jurors and is, thus, at issue in virtually all capital trials – see John H. Blume, et al., *Future Dangerousness in Capital Cases: Always "At Issue,"* 86 Cornell L. Rev. 397, 402 *et seq.*

Washington State has just recently addressed this issue, squarely on point, and decided that even a jury's glimpses of a defendant's ankle shackles was prejudicial. *In re Personal Restraint Petition of Cecil Emile Davis*, ___ P.3d. ___, 2004 WL 2473459 (Wash.) (Nov. 4, 2004) (en banc). In *Davis*, the court found that the image of Davis' shackled ankles may have given jurors a negative inference as to his character:

> *"Although there is no evidence that any juror saw Petitioner in shackles during the penalty phase, we cannot be assured that any negative inference as to Petitioner's character was cured. In the penalty phase, the question is whether there is a reasonable probability that, absent the errors, the sentencer – including an appellate court, to the extent it independently reweighs the evidence – would have concluded that the balance of aggravating and mitigating circumstances did not warrant death."*

Id., at headnote *id.* 22

The glimpses of the shackles were more important during the sentencing phase than the trial, where the evidence against him was overwhelming, wrote Justice Faith Ireland for the majority:

> *"Although the opportunity to observe Davis in shackles was partial and fleeting . . . the balance must tip in Davis' favor in the penalty phase."*

Id.

In an earlier case, the Washington Supreme Court addressed obvious shackling in a capital case, facts more closely to Deck's case, and reversed the case for a new penalty phase:

> *"Here, the issue is the possible impact which shackling the Defendant may have had on the sentencing decision, particularly in connection with the question of future dangerousness. It is undisputed that placing the [D]efendant in restraints indicates to the jury that the Defendant is viewed as a 'dangerous' and 'unmanageable' person, in the opinion of the court, who cannot be controlled, even in the presence of courtroom security."*

State v. Finch, 137 Wash.2d 792 at 795, 975 P.2d 967 (1999) (cited with approval in *Davis*).

Finally, the Sixth Amendment as applied to the States by the Fourteenth Amendment requires that a defendant be confronted with the witnesses against him. A restrained defendant who is compelled to mutely testify against himself has no effective means of confronting himself as a witness. Defendants who are confronted with forensic analysis of samples of body fluids or DNA compulsorily taken from them can challenge the accuracy of such evidence. Defendants presented to the jury as a standing exhibit as to their dangerousness during the penalty phase, not only have no effective means of challenging the State's characterisation of them but effectively testify

against themselves both during presentation of the State's case and their own.

CONCLUSION

If there exists so much as a caraway seed of doubt as to the prejudicial effect of a defendant's personal confinement in chains, then the courts of the United States cannot be seen to falter in their obligations to a fair jury trial. This court should declare that a defendant may not, absent contemporaneously dangerous behavior or threats, be restrained during the penalty phase of a capital trial. Such a ruling by this court would reinforce the fundamental values of the Bill of Rights and give effect to the United States' international human rights treaty obligations.

Amici Curiae urge the Court to grant the relief sought by the Petitioner.

Respectfully submitted.[3]

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No. 04-5293

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OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

CARMAN L. DECK, *Petitioner,*

v.

STATE OF MISSOURI, *Respondent.*

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF MISSOURI

BRIEF OF AMICUS CURIAE OF THE STATES OF CALIFORNIA, ALABAMA, COLORADO, DELAWARE, INDIANA, MISSISSIPPI, MONTANA, NEBRASKA, NEVADA, OHIO, OKLAHOMA, OREGON, SOUTH CAROLINA, SOUTH DAKOTA, TEXAS, UTAH, VIRGINIA, WASHINGTON, WEST VIRGINIA, AND WYOMING IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Are the Fifth, Sixth, Eighth, and Fourteenth Amendments violated by forcing a capital defendant to proceed though penalty phase while shackled and handcuffed to a belly chain in full view of the jury, and if so, doesn't the burden fall on the state to show that the error was harmless beyond a reasonable doubt, rather than on the defendant to show that he was prejudiced?

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IN THE SUPREME COURT OF THE UNITED STATES

No. 04-5293

CARMAN L. DECK, *Petitioner,*

v.

STATE OF MISSOURI, *Respondent.*

INTEREST OF AMICI

Amici curiae are the legal representatives of their states' executives and of the People in their states' appellate and post conviction litigation. The States have a substantial interest in constitutional rules that impact a trial judge's authority to maintain the safety and decorum of the courtroom.

Amici have particular interest in this case because it will be the first time this Court will consider the constitutional implications of restraining a defendant in a criminal proceeding. Since the use of restraints in trial is not uncommon in both state and federal courts, this decision will impact every State, in both capital and noncapital cases. The States have compelling interests in the security of courtroom proceedings, preventing escape, and in the orderly administration of justice. In many instances, restraints present the best method to protect these important interests at trial. A constitutional rule governing restraints that is overly strict or rigid will have a substantial impact on the States' ability to protect these interests.

SUMMARY OF ARGUMENT

This Court has recognized, in several cases, that imposition of restraints may be necessary to further a compelling state interest. *Holbrook v. Flynn,* 475 U.S. 560, 568 (1986); *Estelle v. Williams,* 425 U.S. 501, 505 (1976); *Illinois v. Allen*, 397 U.S. 337, 344 (1970). However, this Court has never expressly evaluated the constitutional implications of restraining a defendant in a criminal trial. A clear constitutional rule is necessary to resolve the disparate rules among the lower courts.

Restraints should not be labeled as "inherently prejudicial." Rather, their prejudicial impact, if any, should be determined on a case-by-case basis. Courts have traditionally overestimated the impact visible restraints have on jurors. It is likely that today's jurors consider restraints as nothing more that ordinary security procedures that apply in all criminal cases. In addition, the important interests restraints may serve and the great variety of restraints available weighs against sweeping generalizations of the prejudicial impact of all restraints.

–The Due Process Clause of the Fourteenth Amendment guarantees a criminal defendant the right to a fair and impartial trial, and is the constitutional provision that should govern the use of restraints at trial. *Kennedy v. Cardwell*, 487 F.2d 101, 104 (6th Cir. 1973). Under the Due Process Clause, it is possible to strike a balance between the substantial state interests restraints serve and the potential for prejudice to the defendant that restraints may cause. A flexible standard of review provides adequate protection to a defendant's right to a fair trial without unnecessarily hampering trial courts with constitutionally-mandated procedural requirements.

Since due process review is ultimately limited to consideration of fundamental fairness, a defendant claiming that the imposition of restraints was unconstitutional must establish more than that the restraints were improperly imposed. A defendant must also establish that any restraints resulted in actual prejudice. Accordingly, to establish a due process violation based on the use of restraints in a criminal proceeding, a defendant must establish: (1) the state's imposition of the restraints was an abuse of discretion; and (2) the restraints rendered his trial fundamentally unfair.

ARGUMENT

I.

THIS COURT SHOULD ESTABLISH A CONSTITUTIONAL RULE GOVERNING RESTRAINTS IN ALL CRIMINAL PROCEEDINGS

The facts of the instant case involve imposition of physical restraints[1/] in a penalty phase retrial. However, amici urge this Court to establish a rule that applies to criminal proceedings in general rather than limit its decision to the penalty phase of a capital case. Restraints are not unique to capital cases. Both state and federal courts throughout the country have evaluated the constitutionality of restraints in numerous noncapital and capital cases alike. *See, generally*, Sheldon Shapiro, Annotation, *Propriety and Prejudicial Effect of Gagging, Shackling, or Otherwise Physically Restraining Accused During Course of State Criminal Trial*, 90 A.L.R.3d 17 (1979). Although the Eighth Amendment imposes specific rules applicable only to capital cases, in general, constitutional rights apply with equal force regardless of the type of criminal case involved. *See, e.g., Ring v. Arizona*, 536 U.S. 584, 606-07 (2002) (Sixth Amendment right to jury determination of all elements applies equally to capital and noncapital cases); *Strickland v. Washington*, 466 U.S. 668, 686-87 (1984) (the

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1. Amici will use the term "restraints" in this brief to generally include "all forms of handcuffs, shackles, manacles, leg irons, and other restraining devices." *People v. Duran*, 545 P.2d 1322, 1326 n.5 (Cal. 1976).

same standard for evaluating claims of ineffective assistance of counsel applies to trials and to capital sentencing proceedings).

This Court has not previously directly addressed the issue of restraints. The closest this Court has come to this issue was its review of security procedures not involving restraints in *Holbrook v. Flynn*, 475 U.S. 560 (1986). In that case, this Court evaluated a constitutional attack on security measures in the courtroom under the due process clause of the Fourteenth Amendment. Two other cases, *Illinois v. Allen*, 397 U.S. 337 (1970) and *Estelle v. Williams*, 425 U.S. 501 (1976), also include discussions of restraints, though neither case involved the imposition of restraints at trial. Because this Court has never directly addressed the constitutionality of imposing restraints on a defendant in a criminal proceeding, lower courts have resorted to interpreting this Court's dicta in *Holbrook*, *Allen*, and *Williams* when evaluating the propriety of a trial court's order to restrain a defendant at trial.

The lack of clear guidance from this Court on restraints has resulted in disparate rules among lower courts. For example, the Ninth Circuit has created a two-step procedure governing the imposition of restraints. "First the court must be persuaded by compelling circumstances 'that some measure was needed to maintain the security of the courtroom.' Second, the court must 'pursue less restrictive alternatives before imposing physical restraints.'" *Jones v. Meyer*, 899 F.2d 883, 885 (9th Cir. 1990).[2/] In contrast, the Fifth Circuit has expressly rejected a "least means" analysis of restraints, recognizing the focus should be on "whether it was reasonable [for the trial court] to conclude at the time that the restraint was necessary." *Marquez v. Collins*, 11 F.3d 1241, 1244 (5th Cir. 1994). Finally, the Fourth Circuit expressly requires the trial court, before imposing restraints "to state for the record, out of the presence of the jury,

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2. The constitutional requirement imposed by the Ninth Circuit on trial courts to "pursue less restrictive alternatives" was derived from the court's reading of dicta in *Illinois v. Allen*.

the reasons therefor and give counsel an opportunity to comment thereon." *United States v. Samuel*, 431 F.2d 610, 615 (4th Cir. 1970).

The significant differences in the standards of review between just three Federal Circuits illustrates the need for uniform standards on this issue. Absent such guidance, lower courts evaluating restraints will continue to rely on this Court's dicta in cases such as *Illinois v. Allen*, *Holbrook v. Flynn*, and *Estelle v. Williams*, three cases in which no restraints were imposed.

II.

THE USE OF RESTRAINTS IN A CRIMINAL PROCEEDING IS NOT AN INHERENTLY PREJUDICIAL STATE ACTION

It is important at the outset to recognize that the use of restraints on a defendant at trial is not inherently prejudicial. Amici recognizes that this Court, in dicta, has characterized binding and gagging a defendant as an "inherently prejudicial" practice that should be subject to close judicial scrutiny. *Holbrook v. Flynn*, 475 U.S. at 568-69. However, because *Holbrook* was not a case about restraints at all, this Court did not need to engage in a detailed, fully-realized analysis of the actual prejudice caused by restraints in general nor the important interests restraints serve. Consequently, *Holbrook's* characterization of shackles as "inherently prejudicial" should now be placed in context.

In the past, this Court has found certain practices to be "inherently prejudicial." The standard for governing whether a state practice is inherently prejudicial is whether "a procedure employed by the State involves such a probability that prejudice will result that it is deemed inherently lacking in due process." *Estes v. Texas*, 381 U.S. 532, 542-43 (1965). Although restraints should not be imposed absent evidence in the record

justifying the need, their unjustified use should not give rise to a presumption of prejudice. Several reasons support this position. First, amici respectfully submit that the prejudicial effect of restraints in general has been overestimated by the courts. Second, this Court and many lower courts have consistently recognized that restraints may serve "compelling state interests" of maintaining courtroom security and controlling unruly defendants. Third, the wide variety of security measures that could technically be called "shackling" is incompatible with a one-size-fits-all label of "inherently prejudicial."

A. The Label "Inherently Prejudicial" Found In *Holbrook v. Flynn* Is Dicta And Is Best Understood In The Context Of That Case

This Court's characterization of shackling as an "inherently prejudicial practice" in *Holbrook* was dicta and was made in reference to the extreme shackling discussed in *Illinois v. Allen*, 397 U.S. 337. *Holbrook*, 475 U.S. at 568-69. In *Holbrook*, this Court's consideration of restraints focused exclusively on *Allen*'s discussion of the prejudice that could result from the jury's view of a totally bound and gagged defendant. *Id.* Since *Holbrook* was not about restraints at all, this Court did not discuss nor consider the impact of less extreme restraints on a jury. Binding and gagging a defendant in full view of the jury throughout a trial is the most extreme form of restraint that could be utilized by a trial court. This Court's description of such a situation as "inherently prejudicial" is understandable.[3] However, while the most extreme form of restraint may fairly

3. Despite the extreme nature of such restraints, this Court nevertheless found that their use at trial in the right circumstances might be "the fairest and most reasonable way to handle a[n unruly] defendant. *Allen*, 397 U.S. at 344.

be characterized as "inherently prejudicial," it does not follow that all forms of restraint should be so labeled. Accordingly, this Court's dicta in *Holbrook* should not be interpreted to cover all forms of restraints that states may use.

B. The Prejudicial Impact Of Restraints On Jurors Has Been Overstated

Before this Court declares that restraints are "inherently prejudicial," consideration must be given to the actual effect visible restraints are likely to have on today's jurors. Amici respectfully submit that the prejudicial impact of restraints has been overstated by the courts.

Despite the lack of empirical studies on the matter, courts historically have assumed that visible restraints have a negative impact on a defendant's presumption of innocence. *See, e.g., Kennedy v. Cardwell*, 487 F.2d at 104. Through repetition, this assumption has cemented in the collective psyche of the courts. It is now virtually a given that visible restraints will have a devastating effect on the jury's perception of a defendant. *See, e.g., State v. Damon*, 25 P.3d 418, 420 (Wash. 2001) ("the jury must necessarily conceive a prejudice against the accused, as being in the opinion of the judge a dangerous man"). Amici disagree with this premise.

Courts should not lightly discount the ability of jurors to focus on the evidence before them. As this Court wisely noted in *Holbrook v. Flynn*,

> Recognizing that jurors are quite aware that the defendant appearing before them did not arrive there by choice or happenstance, we have never tried, and could never hope, to eliminate from trial procedures every reminder that the

> State has chosen to marshal its resources against a defendant to punish him for allegedly criminal conduct.

475 U.S. at 567. This Court further observed, "When defense counsel vigorously represents his client's interests and the trial judge assiduously works to impress jurors with the need to presume the defendant's innocence, we have trusted that a fair result can be obtained." *Id.* at 567-68. Indeed, jurors are routinely instructed that a defendant is presumed innocent, that the people have the burden of proving the defendant guilty beyond a reasonable doubt, and that their decision is to be based solely on the evidence presented at trial. This Court presumes that jurors follow instructions from the trial court. *Greer v. Miller*, 483 U.S. 756, 767 (1987).

Thus, a California Appellate Court sagely noted over 30 years ago,

> A juror is not some kind of a dithering nincompoop, brought in from never-never land and exposed to the harsh realities of life for the first time in the jury box. . . . . Jurors are our peers, often as well educated, as well balanced, as stable, as experienced in the realities of life as the holders of law degrees.

People v. Long, 38 Cal.App.3d 680, 689 (Cal.App. 1974).

The Sixth Amendment right to a jury is founded upon the belief that jurors approach their duties with common sense and intelligence. *See Schulz v. Pennsylvania Railroad Company*, 350 U.S. 523, 526 (1956). This underlying belief must be factored into any consideration of the impact that visible restraints may have on a jury. This Court should not presume that a jury will cast aside its legal obligations and engage in rank speculation regarding dangerousness when faced with a restrained defendant.

Furthermore, no consideration of the impact of restraints and security measures on a jury should overlook the realities of

our modern, post-September 11 society. Security measures have become a commonplace and accepted part of everyday life. *See United States v. Shryock*, 342 F.3d 948, 975 (9th Cir. 2003) ("Requiring members of the public to proceed through a metal detector, show identification, and sign a log-in form are similar to the security methods used in many government and private office buildings in this country"). Jurors today encounter heightened security procedures everyday and are not likely to be surprised or shocked by visible security measures in a courtroom. Indeed, most jurors are likely to have walked through a metal detector on their way into the courthouse.

Consequently, jurors exposed to a restrained defendant are likely to conclude that any restraints are a routine part of courtroom security. Restraints that reasonably appear to be part of the ordinary security measures in the courtroom are not likely to have a prejudicial impact on the jury. *See Holbrook*, 475 U.S. at 571, citing *Dorman v. United States*, 435 F.2d 385, 397 (1970) (greater danger of prejudice if jury aware that arrangements are extraordinary). This is not to say that restraints cannot have a prejudicial impact on jurors. Certainly if extreme restraints are used, such as binding and gagging, jurors would likely conclude that such restraints were not ordinary security measures. Such a situation would likely pose a danger that the jury would view the restraints as an "indication[ ] of the need to separate a defendant from the community at large." *Holbrook*, 475 U.S. at 569. Thus, the determination of whether visible restraints are prejudicial to a defendant must focus on the specific circumstances of each case. To simply assume jurors are adversely affected whenever they observe a defendant in restraints would turn a blind eye to how jurors likely view and consider restraints on a defendant.

In sum, Amici submit that the prejudicial impact on jurors of seeing a defendant in restraints has been exaggerated in the past and certainly must be reconsidered in light of the heightened security that is now a part of everyday life. Although visible restraints, especially extremely severe

shackles, may have a prejudicial impact in an individual case, restraints in general should not be labeled "inherently prejudicial."

C. Declaring All Restraints "Inherently Prejudicial" Ignores The Important State Interests Restraints Serve And The Wide Variety Of Restraints That Exist

Because of the legitimate state interests that restraining a defendant may serve, and the wide variety of restraints that states may employ, a declaration that all restraints are "inherently prejudicial" goes too far.

The use of restraints at trial serve important state interests. *See Holbrook*, 475 U.S. at 568; *Williams*, 425 U.S. at 505 (recognizing that restraints, unlike prison clothes can further an "essential state policy"); *Allen*, 397 U.S. at 344 ("binding and gagging might possibly be the fairest and most reasonable way to handle" a particularly obstreperous and disruptive defendant). The Fourth Circuit in *United States v. Samuel*, 431 F.2d 610, 615 (4th Cir. 1970) recognized many of the important state interests that restraints may serve in a criminal proceeding.

> The judge presiding at the trial, the jurors, courtroom personnel and spectators are entitled to security in the performance of their functions or in observing the trial. The members of the public out of the courtroom are entitled to security in the pursuit of their daily activities. The public also has an interest in the expeditious trial of persons accused of crime, and an interest in preventing the guilty from being at large and committing other offenses.

The courtroom is the centerpiece of a state's criminal justice system and state action designed to protect the security and decorum of this centerpiece should not lightly be declared

inherently prejudicial.

In addition to the compelling state interests that restraints serve, the great variety of potential restraints also weighs against a finding that all restraints are inherently prejudicial. There is no one type of restraint utilized by the states, and new security devices are being developed continually. *See, e.g., People v. Mar*, 52 P.3d 95, 97 (Cal. 2002) (reviewing the use of a "stun belt" as a security measure during trial). Restraints utilized by the states vary widely in their visibility and severity. Some restraints are so minimal that they are not even visible to the jury. *See, e.g., Williams v. Woodford*, 306 F.3d 665, 690 (9th Cir. 2002) (thin, metal leg chain not visible to the jury); *Odom v. State*, 769 So.2d 189, 193 (Miss Ct. App. 2000) (waist chain hidden from view of jury). At the other extreme of severity is the total binding and gagging of a defendant in full view of the jury. *See Allen*, 397 U.S. at 344. The practical reality, however, is that most restraints fall somewhere between these two extremes. A unobtrusive waist chain or restraining belt that secures a defendant to his or her chair is a security procedure of which the jury might not even be aware. To condemn all restraints as inherently prejudicial ignores the reality that many restraints that are utilized by today's courts will not prejudice a defendant at all.

This Court in *Holbrook* expressly eschewed a bright-line approach to assigning prejudice when reviewing security procedures, emphasizing that:

> "reason, principle, and common human experience," *Williams, supra, at 504*, counsel against a presumption that any use of identifiable security guards in the courtroom is inherently prejudicial. In view of the variety of ways in which such guards can be deployed, we believe that a case-by-case approach is more appropriate.

475 U.S. at 569. Similarly, given the "variety of ways" restraints can be imposed, the same case-by-case approach

established in *Holbrook* should apply to constitutional challenges of restraints.

III.

CONSTITUTIONAL REVIEW OF RESTRAINTS SHOULD BE LIMITED TO A DUE PROCESS FOCUS ON FUNDAMENTAL FAIRNESS

"Cases in this Court have long proceeded on the premise that the Due Process Clause guarantees the fundamental elements of fairness in a criminal trial. . . . But it has never been thought that such cases establish this Court as a rule-making organ for the promulgation of state rules of criminal procedure." *Spencer v. Texas*, 385 U.S. 554, 563-64 (1967). "[A] state rule of law "does not run foul of the Fourteenth Amendment because another method may seem to our thinking to be fairer or wiser or to give a surer promise of protection to the prisoner at bar." *Id.* (citing *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)).

Since the use of restraints is not expressly governed by any constitutional provision, a constitutional challenge to restraints should be governed by the due process clause. Absent a specific constitutional violation, federal habeas review of trial error is limited to whether the error "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974). Moreover, the appropriate standard of review for such a claim on writ of habeas corpus is "the narrow one of due process, and not the broad exercise of supervisory power." *Id.* at 642.

Given the narrow focus of the Due Process Clause, any constitutional rule governing restraints should be similarly focused. A blanket prohibition against restraints or detailed procedural requirements would be a "broad exercise of supervisory power" inconsistent with the narrow due process review established by the constitution. *See Donnelly v. DeChristoforo*, 416 U.S. at 642.

A. The Imposition Of Restraints Are Necessary In Certain Circumstances To Serve Compelling State Interests

In *Estelle v. Williams*, 425 U.S. at 505, this Court held that compelling a defendant to appear in prison clothes at trial violated due process. An important factor in this Court's decision was the recognition that "compelling an accused to wear jail clothing furthers no essential state policy," unlike physical restraints. *Id.* Thus, a due process analysis of the use of restraints at trial must take into account the important benefits restraints may provide.

Despite the possibility of prejudice restraints may present, courts have consistently recognized that restraints are necessary in some cases. "[D]ue process concerns 'must be balanced against the court's obligation to protect the court and its processes, and to attend to the safety and security of those in the courtroom.'" *Bagwell v. Dretke*, 372 F.3d 748, 754 (5th Cir. 2004) (quoting *United States v. Nicholson*, 846 F.2d 277, 279 (5th Cir. 1988)). Generally, courts find that the right to appear in court without restraints may be relinquished where a defendant's past or present conduct suggests the possibility he may try to escape, pose a threat to the safety of the people in the courtroom, or disrupt order in the courtroom. *See, e.g., Kennedy*, 487 F.2d at 105; *Wood v. State*, 699 So.2d 965, 966 (Ala. Crim. App. 1997); *People v. Anderson*, 22 P.3d 347, 382 (Cal. 2001); *People v. Love*, 763 N.E.2d 829, 833 (Ill. App. Ct. 2002); *Evans v. State*, 571 N.E.2d 1231, 1238 (Ind. 1991); *Commonwealth v. Brown*, 305 N.E.2d 830, 834 (Mass. 1973); *People v. Williams*, 433 N.W.2d 356, 314 (Mich. Ct. App. 1988).

Examples of the application of these and similar factors abound in the case law. *See, generally*, Sheldon Shapiro,

Annotation, *Propriety and Prejudicial Effect of Gagging, Shackling, or Otherwise Physically Restraining Accused During Course of State Criminal Trial*, 90 A.L.R.3d 17 (1979). For example, the Supreme Court of Kentucky upheld the imposition of restraints in a case in which the record showed that the defendant had escaped from prison five years earlier, had planned several escapes, and was skilled in martial arts. *Hill v. Commonwealth*, 125 S.W.3d 221, 235 (Ky. 2004). The Arizona Supreme Court found that the record supported the trial court's decision to have the defendant restrained where it showed that the defendant had prior convictions for three armed robberies and two first degree murders and had attacked a deputy sheriff while attempting to escape from jail. *State v. Lee*, 944 P.2d 1222, 1231 (Ariz. 1997). In a case where the defendant was charged with a "brutal murder" and had escaped while awaiting trial, the Missouri Supreme Court found no abuse of discretion when the trial court ordered restraints. *State v. Armentrout*, 8 S.W.3d 99, 108 (Mo. 1999). The California Supreme Court found that the defendant's "three reported fistfights [in jail], together with his extensive criminal history" supported the trial court's decision to restrain the defendant. *People v. Hawkins*, 897 P.2d 574, 586 (Cal. 1995). As the above examples illustrate, restraints are often necessary to ensure that the state's compelling interests in the security and decorum of the courtroom are protected.

There is little doubt, as this Court recognized in *Illinois v. Allen*, that the use of restraints may sometimes be the "fairest and most reasonable way to handle" a particular situation. 397 U.S. at 344. Any constitutional rule governing restraints should therefore be flexible enough to allow courts to use restraints when the circumstances of a case and the needs of the state require.

B. The Due Process Clause Has A Limited Role In Defining The Procedures Trial Courts Must Follow Before Imposing Restraints On A Defendant At Trial

In *Holbrook* this Court candidly acknowledged that its "task was not to determine whether it might have been feasible for the State to have employed less conspicuous security measures in the courtroom." 475 U.S. at 572. Rather, this Court's authority was "more constrained when reviewing a constitutional challenge to a state-court proceeding." *Id.* The only question facing this Court was whether the circumstances presented at trial "pose[d] an unacceptable threat to defendant's right to a fair trial." *Id.* A similar, limited approach should apply to the review of restraints.

The trial court has a duty and the power to take precautions to maintain security and order in the courtroom. *Wood*, 699 So.2d at 966; *Brown*, 305 N.E.2d at 834. Reviewing courts have universally recognized the need to allow the trial court wide discretion to decide whether physical restraints are necessary to protect those interests in light of all the circumstances. *See, e.g., Lee*, 944 P.2d at 1231; *People v. Boose*, 362 N.E.2d 303, 305 (Ill. 1977); *Brown*, 305 N.E.2d at 834; *Armentrout*, 8 S.W.3d at 108; *People v. Young*, 185 A.D.2d 369, 369 (N.Y. App. Div. 1992). As this Court has noted, "We believe trial judges confronted with disruptive, contumacious, stubbornly defiant defendants must be given sufficient discretion to meet the circumstances of each case. No one formula for maintaining the appropriate courtroom atmosphere will be best in all situations." *Allen*, 397 U.S. at 343.

Given the wide discretion afforded trial courts to maintain the security and decorum of the courtroom, no single procedure imposing restraints at trial should be constitutionally compelled. If the evidence establishing the need for restraints is clear in the record, the trial court need not hold a hearing on the matter.

"The process due must reflect the inherent case-specific character of the trial court's decision to restrain a defendant and the reality that the issue is usually collateral to the trial itself." *Marquez*, 11 F.3d at 1244. Any hearing conducted by the court may be informal and may dispense with the ordinary rules of admissibility of evidence. *Brown*, 305 N.E.2d at 836; *State v. Roberts*, 206 A.2d 200, 204 (N.J. Sup. Ct. App. Div. 1965).

Because the trial court must often act proactively to maintain security, and because of the numerous factors to be weighed, a "least means" analysis should not be constitutionally imposed on the trial court. *Bagwell*, 372 F.3d at 754; *Marquez*, 11 F.3d at 1244. As a practical matter, there may well be more than one way of dealing with a defendant who threatens courtroom security or decorum. For example, looking back, a reviewing court may observe that the trial court had the option of bringing more officers into the courtroom. The trial court, however, may simply have made a judgment call that sudden increased security would be more obvious and more likely to prejudice the defendant than restraints. *See Harrell v. Israel*, 672 F.2d 632, 637 (7th Cir. 1982) (recognizing that "[l]ess intrusive methods of insuring security, such as stationing guards around the courtroom, would probably be less effective and may have an even more detrimental impact on the jury than shackles".) Therefore, the Fifth Circuit correctly held "[t]hat in retrospect some lesser restraint might have sufficed is not determinative." *Marquez*, 11 F.3d at 1244. This Court in *Holbrook* refused to determine whether a less conspicuous deployment of officers may have been feasible in that case, recognizing that such considerations were not part of the due process analysis. 475 U.S. at 572; *see also Allen*, 397 U.S. at 343 ("No one formula for maintaining the appropriate courtroom atmosphere will be best in all situations")

Amici recognize that this Court suggested in *Allen* "that no person should be tried while shackled and gagged except as a last resort." *Allen*, 397 U.S. at 343. This dicta should not be interpreted to establish a constitutional requirement that trial

courts may only impose restraints as a last resort and can best be understood in context. In that case, this Court discussed the propriety of trying a defendant who is *bound and gagged throughout trial*. Amici expect that trial courts would not impose such extreme restraints absent compelling need. However, *Allen* should not be read to establish a constitutional rule that restraints of any kind may only be imposed as a "last resort" over security measures that do not involve restraints. Indeed, a "last resort" requirement could lead to absurd results. Under such a rule, for example, a trial court would be forced to forego the use of an undetectable restraint in favor of a more-visible security measure, like increased bailiffs, that did not involve restraint. Consequently, a "last resort" requirement could compel a trial court to adopt security measures that are more likely to result in prejudice than restraints. The constitution should not be interpreted to compel such a result.

In sum, this Court should not constitutionalize procedures governing the imposition of restraints at trial. The Due Process Clause, and its focus on the fundamental fairness of a defendant's trial provides sufficient protection to the fundamental rights of a defendant while affording trial courts the necessary flexibility to ensure that the security and decorum of the courtroom are maintained.

IV.

A DEFENDANT CHALLENGING THE IMPOSITION OF RESTRAINTS HAS THE BURDEN OF ESTABLISHING THAT THE RESTRAINTS WERE UNJUSTIFIED AND THAT THEIR USE RENDERED THE TRIAL FUNDAMENTALLY UNFAIR

A defendant claiming that the imposition of restraints at trial violated the constitution has the burden of establishing a constitutional violation as a demonstrable reality. A defendant

must first preserve any constitutional claim with an appropriate objection at trial. Then, to establish a due process violation based on the use of restraints in a criminal proceeding, a defendant must demonstrate: (1) the state's imposition of the restraints was an abuse of discretion; and (2) the restraints rendered his trial fundamentally unfair.

A. A Defendant Must Object, On Constitutional Grounds, To The Imposition Of Restraints At Trial To Preserve The Issue For Review

A criminal defendant who is subjected to physical restraints and believes that the trial court abused its discretion should be required to raise any complaints to the trial court in the first instance. In *Estelle v. Williams*, this Court held that a defendant must object to wearing identifiable prison clothing at trial in order to preserve a constitutional claim for appeal. *Estelle v. Williams*, 425 U.S. at 512-13.

The same approach should apply in physical restraint cases. This Court recognized the possibility that a defendant might appear in prison clothing for strategic reasons, believing that it might elicit sympathy from the jury. *Id.* at 508. If prison clothing could produce that reaction, so could restraints. And in a penalty phase, a defendant might appear in prison clothing and restraints as part of a strategy to demonstrate acceptance of responsibility for his or her crime. *State v. Elmore*, 985 P.2d 289, 305, 307 (Wash. 1999). Moreover, it is possible that defense counsel could find monitoring a volatile client quite distracting, and that restraints could be a solution that would permit counsel to better serve the client by freeing counsel to concentrate on the proceedings. Deference to these sorts of strategic decisions therefore requires that the defendant be the one to raise the issue of restraints at trial.

B. A Defendant Claiming That Restraints Imposed At Trial Were Improper Must Establish That The Trial Court's Decision To Impose Restraints Was An Abuse Of Discretion

When a defendant challenges the necessity of restraints on appeal or habeas, he or she must first establish that the restraints were improperly imposed. The burden should be on the defendant to show that the trial court abused its discretion in finding that restraints were necessary. *Brown*, 305 N.E.2d at 834; *State v. Fisher*, 45 S.W.3d 512, 514 (Mo. Ct. App. 2001).

No magic formula exists to determine when restraints should be imposed in a given circumstance. As this Court has said in the related context of predicting future dangerousness, "It is not easy, of course, to predict future behavior. The fact that such a determination is difficult, however, does not mean that it cannot be made. Indeed, prediction of future criminal conduct is an essential element in many of the decisions rendered throughout out criminal justice system." *Jurek v. Texas*, 428 U.S. 262, 275 (1976). Considering the variety of possible restraints and multiple factors that may support a trial court's decision to restrain a defendant, an abuse of discretion standard of review is the most flexible and feasible standard for this issue. "[B]ecause the trial judge is uniquely situated to make this judgment call, he must be given considerable discretion." *Marquez*, 11 F.3d at 1244. "The trial judge can observe firsthand the defendant's demeanor; he can take into account the mood of others both inside and outside the courtroom, and the degree of security provided by the physical facilities where the particular trial is being held." *State v. Moen*, 491 P.2d 858, 861 (Idaho 1971).

Numerous factors may support a trial court's decision to impose restraints. Many courts have found the following non-exclusive list of factors to be relevant to the court's decision to impose restraints:

> The seriousness of the present charge against the defendant; defendant's temperament and character; his age and physical attributes; his past record; past escapes or attempted escapes, and evidence of a present plan to escape; threats to harm others or cause a disturbance; self-destructive tendencies; the risk of mob violence or of attempted revenge by others; the possibility of rescue by other offenders still at large; the size and mood of the audience; the nature, and physical security of the courtroom; and the adequacy and availability of alternative remedies.

Boose, 362 N.E.2d at 305-06; *accord*, *Brown*, 305 N.E.2d at 836 n.18; *State v. Simmons*, 614 P.2d 1316, 1317 (Wash. Ct. App. 1980).

Moreover, in weighing the various factors identified above and deciding whether and how a defendant should be restrained, the trial court often relies on a variety of sources. The defendant's behavior in court may establish the necessity. Additionally, other circumstances may dictate the need for a court to act proactively rather than wait until a serious problem arises. *Kennedy*, 487 F.2d at 111; *Hawkins*, 897 P.2d at 586; *Love*, 763 N.E.2d at 835; *Simmons*, 614 P.2d at 1317. A trial court should be able to rely on the reports of law enforcement regarding the defendant's conduct in jail, including escape attempts and acts of violence, and may consider the officers' recommendations. *Brown*, 305 N.E.2d at 834; *Armentrout*, 8 S.W.3d at 107-08. The trial court should also be able to consider whether the defendant's record includes escape attempts or crimes of violence. *Roberts*, 206 A.2d at 204.

In addition to turning to these sources, the trial court should be able to consider the layout of the courtroom and whether it presents any particular security risks in deciding what security precautions to take. *Kennedy*, 487 F.2d at 110-11. The trial court should be able to consider whether enough security personnel are available to it for the duration of the proceedings,

how obvious their presence would be, and whether they might effectively deal with the concerns presented. *Id.* at 111.

Finally, mere deficiencies in the procedure for determining the necessity for restraints, even the lack of hearing, should not result in reversal if the reviewing court can conclude from the record on appeal that there was some justification for the security measures that were taken. *See, e.g., Moen*, 491 P.2d at 861; *see also Marquez*, 11 F.3d at 1247; *Lee*, 944 P.2d at 1231; *State v. Stewart*, 676 P.2d 1108, 1114 (Ariz. 1984); *Bryant v. State*, 785 So.2d 422, 429 (Fla. 2001). And again, as discussed above, the reviewing court should not indulge in hindsight and a "least means" analysis. *Bagwell*, 372 F.3d at 754; *Marquez*, 11 F.3d at 1244. If the record before the reviewing court reveals a legitimate basis for the trial court to impose restraints, the decision of the trial court should be upheld.

Given the numerous factors that can support a trial court's decision to impose restraints, a reviewing court should not lightly second-guess the trial court's decision. If the record contains evidentiary support for the trial court's imposition of restraints, a defendant's due process claim should be denied.

C. Improper Imposition Of Restraints Only Violates The Constitution If The Defendant Establishes That The Restraints Rendered The Trial Fundamentally Unfair Under The Totality Of The Circumstances

Even if a defendant establishes that the trial court abused its discretion by imposing restraints at trial, the due process inquiry is not over. Under the due process clause, a defendant is only entitled to relief if he or she establishes that the improper restraints rendered the trial fundamentally unfair.

1. A Defendant Should Have The Burden Of Establishing That The Imposition Of Restraints Resulted In Prejudice

A basic premise of the adversarial system is that a party complaining of error is required to establish the basis for that error. *Miller v. United States*, 78 U.S. 268, 299-300 (1870). Thus, a defendant claiming that the imposition of restraints violated the constitution has the burden of establishing an actual constitutional violation.

As discussed above, constitutional review of restraints should be governed by the due process clause, which focuses on the fundamental fairness of a criminal proceeding. Thus, it is not enough for a defendant to establish that restraints were unjustified or improper. A defendant must also establish that the restraints had a constitutionally significant impact on his or her trial. "[I]n most cases involving claims of due process deprivations we require a showing of identifiable prejudice to the accused." *Estes*, 381 U.S. at 542-43.

This Court should not presume prejudice when restraints are improperly imposed. Instead, a defendant must establish that the restraints, when considered in the totality of the circumstances, rendered his trial fundamentally unfair. A defendant is in the best position, in most instances, to establish this prejudice.

Courts have recognized two major dangers that restraints may present to a defendant's right to a fair trial. First, the sight of a defendant in restraints may be interpreted by the jury as an "indication[ ] of the need to separate a defendant from the community at large"[4/] *Holbrook*, 475 U.S. at 569. Second, restraints may impair a defendant's ability to communicate with defense counsel or otherwise participate in his defense. *See People v. Harrington*, 42 Cal. 165, 168 (1871).

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4. As discussed above, Amici respectfully submit that this danger has been greatly exaggerated by the courts.

For either danger, a defendant is in the best position to establish prejudice. Both types of prejudice require certain foundational facts be established before any actual prejudice may be determined. For example, a claim that restraints had a negative impact on the presumption of innocence requires, at a minimum, a showing that the jury was aware of the restraints. Similarly, a claim that restraints impaired a defendant's ability to participate in his or her defense requires some evidence of the actual impact that the restraints had on the defendant. Rather than require the state to prove a negative (i.e., that no members of the jury saw the restraint or that the restraints did not impair the ability of the defendant to communicate with counsel), a defendant should be required to establish the foundational facts necessary to support a claim of prejudicial constitutional error. In most instances, defendants are in the best position to establish such facts, especially those involving the impact to the defendant himself. Once such foundational facts are established, a reviewing court can better consider the totality of the circumstances to determine if the defendant's trial was fundamentally fair.

Requiring a defendant to establish prejudice is consistent with basic principles of our adversarial system. A party claiming error has the burden of establishing that error. Since the use of restraints at trial only violates the constitution if their use was unjustified and rendered the trial fundamentally unfair, a defendant claiming constitutional error should be required to prove both circumstances to obtain relief.

2. Any Determination Of Prejudice From Restraints Must Consider The Totality Of The Circumstances

Given the multitude of circumstances in which restraints may be imposed and the numerous types of restraints that may be employed, any evaluation of prejudice must focus on the

specifics of each case. Indeed, this Court in *Holbrook* emphasized the need to focus on the totality of the circumstances when evaluating the constitutionality of security measures utilized by the state. "[A]ll a federal court may do in such a situation is look at the scene presented to jurors and determine whether what they saw was so inherently prejudicial as to pose an unacceptable threat to defendant's right to a fair trial." *Holbrook*, 475 U.S. at 572.

Although prejudice should be determined based on the specific facts of a case, several factors are likely to be relevant on the issue of prejudice. These factors include: the nature and visibility of the restraints; the length of exposure to the jury; any instructions regarding restraints; any pre-trial questioning of jurors; the nature of the charge against the defendant; and the strength of the evidence.[5/]

A reviewing court evaluating prejudice should first consider the nature and severity of the restraints employed. Unobtrusive restraints, such as a waist chain, even if perceived by the jury, are less likely to prejudicially affect a jury than more visible or obvious restraints. As discussed above, the less obvious and minimal the restraints imposed on a defendant, the greater likelihood that jurors will simply assume that the restraints are an ordinary matter of courtroom security that applies to every criminal case. *See Holbrook*, 475 U.S. at 567, 571. Restraints that reasonably appear to be part of the ordinary security measures in the courtroom are not likely to have a prejudicial impact on the jury.

In addition, a reviewing court should consider the length of the jury's exposure to restraints. In *Estelle v. Williams*, this Court considered the possible effect on the jury of prolonged exposure to a defendant in jail clothes, and observed "that the

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5. Amici are not attempting to present an exhaustive list of factors or circumstances that courts should consider when evaluating prejudice. Rather, amici are presenting those factors which are most commonly considered by the courts in these types of cases.

constant reminder of the accused's condition implicit in such distinctive, identifiable attire may affect a juror's judgment." 425 U.S. at 504-505. Thus, a fleeting exposure to restraints cannot be said to have the same impact on the jury as seeing a defendant visibly bound throughout a trial. *See, e.g., State v. Brooks*, 960 S.W.2d 479, 491-92 (Mo. 1997).

The instructions to the jury should also be evaluated. The extent that the trial court instructed the jury to ignore the presence of restraints or other security measures obviously has an impact on the potential prejudice to a defendant. "We normally presume that a jury will follow an instruction to disregard inadmissible evidence inadvertently presented to it, unless there is an overwhelming probability that the jury will be unable to follow the court's instructions. . . ." *Greer v. Miller*, 483 U.S. at 767; *see also Broadus v. State*, 487 N.E.2d 1298, 1303 (Ind. 1986) (court's instruction to jury to disregard restraints presumed to cure any prejudice).

Moreover, the mere fact that the jury was not instructed to disregard restraints should not be determinative of prejudice. When a trial court has undertaken efforts to hide restraints from the jury, the lack of instructions on restraints is understandable. A trial court may reasonably believe that the restraints were not observed by the jury and therefore refrain from instructing the jury for fear of drawing unnecessary attention to the restraints. In such a circumstance, it is incumbent on a defendant to request instructions if he or she fears that the jury observed any restraints.

In addition to instructions, the extent that jurors where questioned prior to trial regarding restraints should also be considered. Amici recognize that this Court expressed skepticism over jurors' ability to prospectively declare a particular situation will not effect them. *Holbrook*, 475 U.S. at 570. Amici respectfully disagree with this Court's skepticism. Questioning of jurors prior to trial provides jurors with guidance on what should and should not be considered during the trial. If specifically asked whether the sight of restraints will make a

difference in his or her consideration of the evidence, a reasonable juror would necessarily understand, at the outset, that restraints or other security measures are immaterial to the issue of the defendant's guilt or proper punishment. Jurors' assurance that restraints will not effect their decision should not lightly be dismissed. "Jurors are our peers, often as well educated, as well balanced, as stable, as experienced in the realities of life as the holders of law degrees." *People v. Long*, 38 Cal.App.3d at 689.

Furthermore, the charge against the defendant should also be evaluated. For example, a jury would not be surprised to see restraints on a defendant in a case involving a prison crime. *Harrell v. Israel*, 672 F.2d at 638 (it is not unreasonable to assume that the jury would naturally expect that when inmates appear in court, either as parties or witnesses, adequate security measures would be taken"). The fact that a defendant is already an inmate in prison and the jury is aware of the defendant's prisoner status are a important factors to consider when evaluating prejudice. *State v. Gilbert*, 429 A.2d 323, 327 (N.H. 1981).

Finally, the strength of the evidence against the defendant should be considered. Overwhelming evidence of guilt may overcome the improper or even egregious, imposition of restraints. *See State v. Johnson*, 489 So.2d 301, 304 (La. Ct. App. 1986) (restraints harmless in light of five eyewitnesses and substantial evidence against defendant). In such a situation, the lack of restraints could not have made a difference to the outcome of the trial. Accordingly, strong evidence of guilt or overwhelming aggravating evidence cannot be ignored when evaluating the prejudice of even improperly imposed restraints.

Determining if restraints rendered a trial fundamentally unfair requires a reviewing court to consider the totality of the circumstances presented to the jury. "[T]he Constitution entitles a criminal defendant to a fair trial, not a perfect one." *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986). Unless the imposition of restraints rendered a trial fundamentally unfair, even if the restraints were unjustified, no due process violation

has occurred.

V.

THE MISSOURI SUPREME COURT PROPERLY REJECTED PETITIONER'S CONSTITUTIONAL ATTACK ON THE RESTRAINTS USED DURING THE PENALTY PHASE RETRIAL

The Missouri Supreme Court properly determined that the imposition of restraints on Petitioner during the retrial of the penalty phase of his capital case did not violate the United States Constitution. Petitioner has not established that the trial court abused its discretion, nor has he established that the imposition of restraints rendered his trial fundamentally unfair.

"An abuse of discretion will be found only where the trial court makes an arbitrary, capricious, whimsical, or manifestly unreasonable judgement." *F.D.I.C. v. Oldenberg*, 34 F.3d 1529, 1555 (10th Cir. 1994) (internal quotes omitted). Here, in upholding the trial court's decision to restrain Petitioner, the Missouri Supreme Court found that "there was a risk that Appellant might flee in that he was a repeat offender and evidence from the guilt phase of his trial indicated that he killed his two victims to avoid being returned to custody." *State v. Deck*, 136 S.W.3d 481, 485 (Mo. 2004). Appellant's status as a repeat offender and the circumstances of the crime provided sufficient evidence for the trial court to conclude that he was an escape risk.

On this record, the trial court's factual finding that Petitioner was an escape risk was not clearly erroneous. *See, Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990) (abuse of discretion found if trial court's decision was based "on a clearly erroneous assessment of the evidence"). Once the trial court concluded that Petitioner was an escape risk, the decision to impose restraints was justified. *See Billups v. Garrison*, 718

F.2d 665, 668-69 (4th Cir. 1983) (restraints justified when defendant "posed more than an average escape risk").

In addition to failing to establish that imposition of restraints was an abuse of discretion, Petitioner also has not carried his burden to establish that his trial was rendered fundamentally unfair. Preliminarily, as the Missouri Supreme Court found, Petitioner "made no record of the extent of the jury's awareness of the restraints throughout the penalty phase." *Deck*, 136 S.W.3d at 485. Absent evidence of the visibility of the restraints, any determination of prejudice would be speculative.

However, even assuming the restraints were visible, Petitioner cannot establish that the penalty phase was rendered fundamentally unfair. Most significant to this issue was the jury's awareness that Petitioner was a convicted multiple murderer who would spend the rest of his life in prison. Under the circumstances, the jury likely expected Petitioner to be restrained. Indeed, the jury was fully aware that Petitioner was not heading home at the end of each day's court proceedings, but back to a prison cell. *See Wilkerson v. Whitley*, 16 F.3d 64, 67-68 (5th Cir. 1994), *vacated by* 16 F.3d at 68, *reinstated in relevant part*, 28 F.3d 498, 509 (5th Cir. 1994) (en banc) (harmless error for the trial court to try a convicted felon and inmate in improper restraints and handcuffs because the jury could have assumed that all inmates were tried in restraints).

Moreover, the evidence which supported the trial court's determination that Petitioner was an escape risk was before the jury during the penalty phase. When the jury is exposed to the very evidence which supports the trial court's decision, a reviewing court should presume that the jury interpreted the evidence in the same manner that the trial court did. Thus, rather than assume that the jury in this case speculated that the restraints were imposed because of a concern about Petitioner's dangerousness, the jury likely concluded that Petitioner was restrained to prevent an escape attempt. Jurors should not be presumed to jump to unsupported conclusions as to the reasons

for restraints in the face of the very evidence which establishes the actual reason for the restraints.

Finally, the venire panel in this case was specifically questioned about the effect that restraints would have on their decision. No members of the panel indicated that the restraints would affect them. As discussed above, this Court should give credence to the jurors' indication that restraints would not effect them. Furthermore, the questioning by counsel alerted the jurors, prior to trial, that the presence of restraints was not to be considered in their decision.

In sum, Petitioner has not established that the trial court abused its discretion in ordering him restrained during his penalty phase retrial. Furthermore, Petitioner has not established that the imposition of restraints rendered the proceedings fundamentally unfair. Accordingly, his due process claim should be denied.

CONCLUSION

The decision of the Missouri Supreme Court should be affirmed.

Dated: January 27, 2005

Respectfully submitted,

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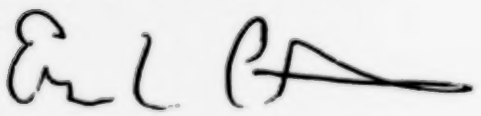

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